apparently not reported up to 15 U.S.?

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~349~~ 45

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM C. REDDON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED APRIL 3, 1888.

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1 In the Third Judicial District Court of Utah Territory, County of Salt Lake.

WILLIAM C. REDDON, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Transcript.

P. L. Williams, attorney for defendant; Arthur Brown, attorney for plaintiff.

Filed May 19th, 1887.

E. T. SPRAGUE,
Clerk Sup. Court.

2 & 3 In the Third District Court, Territory of Utah, County of Salt Lake.

WILLIAM C. REDDON, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Complaint.

Plaintiff complains of defendant and alleges:

First. That the defendant now is and at the times hereinafter mentioned was a corporation organized and existing under the laws of the United States, and was the owners of and operating a certain coal mine at Grass Creek, in the county of Summit and Territory of Utah.

Second. That on the 25th day of May, 1885, said plaintiff was in the employ of said defendant, and as such employee was engaged as a laborer and track-layer or track-repairer in said coal mine of said defendant.

Third. That said defendant, through its carelessness and negligence, allowed the roof and walls of said mine and its different rooms and apartments to become unsafe and insecure, and that said defendant well knew the unsafe and insecure condition thereof.

Fourth. That while plaintiff was at work in said mine, on the day last aforesaid, as such employee, and subject to and under the orders and directions of the superintendent or foreman thereof, without any fault or negligence on the part of said plaintiff, a large mass of coal fell from the roof and walls of said mine upon plaintiff
4 and wounded, bruised, and *and* maimed him, and from and by reasons of such wound, bruise, and maim plaintiff became sick and disabled and has so remained ever since, and is now wholly unable to do or perform any manner of labor, and has, by reason whereof, suffered great pain of body and mind, and has been compelled to expend a large sum of money for medical attendance.

That plaintiff has sustained damages by reason of said premises to the amount of $25,000.

Wherefore plaintiff prays judgment against the defendant for the sum of $25,000 damages and for costs of suit.

ARTHUR BROWN,
Attorney for Plaintiff.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

William C. Reddon, the plaintiff in said action, being duly sworn, says he has read the foregoing complaint, knows the contents thereof, and the same is true.

W. C. REDDON.

Subscribed and sworn to before me this 1st day of May, A. D. 1886.

[NOTARIAL SEAL.] EDWARD B. CRITCHLOW,
Notary Public.

Title of court and cause. Complaint. Filed June 11th, 1886. J. M. Zane, clerk, by H. G. McMillan, deputy clerk. Issued June 11th, 1886. Arthur Brown, attorney for plaintiff.

(Title of Court and Cause.)

Answer.

The said defendant, answering the plaintiff's complaint herein, denies that the said defendant, through its carelessness or negligence or otherwise, allowed the roof or walls of said mine or its different rooms or apartments or any of them to become unsafe or insecure, or that said defendant well or at all knew the unsafe or insecure condition thereof.

And the said defendant, on its information and belief, denies that while the said plaintiff was at work, as alleged in his said complaint, as such employee, as subject to or under the order or directions of said superintendent or foreman, without fault or negligence on the part of said plaintiff, the said or any coal fell from the roof or walls of said mine upon the plaintiff or wounded, bruised, or maimed him, or that from or by reason of such wound, bruise, or maim plaintiff became sick or disabled or has so remained ever since or for any time whatever, or that he was at the time of filing said complaint or is now wholly or otherwise unable to do or perform any manner of work or has by reason whereof suffered great or any pain of body or mind or has been compelled to expend or has expended a larg- or any sum of money for medical attendance.

Denies that the said plaintiff has sustained damages by reason of the said alleged premises to the amount of $25,000 or any other sum.

P. L. WILLIAMS,
Attorney for Defendant.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Parley L. Williams, being first duly sworn, on his oath deposes and says that he is the attorney for said defendant, and makes this verification on behalf of and for the reason that no officer of said defendant is in the said county where affiant resides.

Affiant further says that he has read the foregoing and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

P. L. WILLIAMS.

Subscribed and sworn to before me this 20th day of September, 1886.

[SEAL.] WALDEMAR VAN COTT,
Notary Public.

Title of court and cause. Answer. Received copy of the within answer on this 20th day of September, 1886. Arthur Brown, attorney for plaintiff. Filed September 20th, 1886. J. M. Zane, clerk, by H. G. McMillan, deputy clerk. P. L. Williams, attorney for defendant.

The said action came on regularly for trial at the September term, 1886, of said court, and was tried by a jury, and upon the 1st day of December, 1886, the said jury returned their verdict into court in the words and figures following, to wit:

6 (Title of Court and Cause.)

Verdict.

We, the jurors impaneled in the above case, find the issues for plaintiff and assess his damages at the sum of $20,000.

Dated December 1st, 1886.

J. M. HARVEY, *Foreman.*

Filed December 1st, 1886.

J. M. ZANE, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

And thereupon on said day judgment was duly rendered and entered upon said verdict in the words and figures following, viz:

(Title of Court and Cause.)

Judgment on Verdict.

This action came on regularly for trial; the said parties appeared by their attorneys; a jury of twelve persons was regularly impaneled and sworn to try said action; witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence,

the argument of counsel, and instructions of the court the jury retired to consider of their verdict, and subsequently returned into court and, being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit:

"We, the jurors impaneled in the above case, find the issues for the plaintiff and assess his damages at the sum of $20,000.

"J. M. HARVEY, *Foreman.*"

Dated December 1st, 1886.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of twenty thousand ($20,000) dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $128.75.

Judgment entered December 1st, A. D. 1886.

Afterwards, to wit, on the 10th day of December, 1886, the said defendant served and filed a notice of its intention to move for a new trial; which notice was in the following language, to wit:

7 (Title of Court and Cause.)

Notice of Motion for New Trial.

To the said plaintiff and to Arthur Brown, Esq., his attorney:

Take notice that the said defendant intends to move the said court for a new trial herein, which will be made upon a statement of the case to be hereafter settled and filed. The said motion will be made upon the following grounds, to wit:

First. Excessive damages appearing to have been given under the influence of passion or prejudice.

Second. Insufficiency of the evidence to justify the verdict.

Third. That the said verdict is against law.

Fourth. Error in law occurring at the trial and excepted to by the defendant.

P. L. WILLIAMS,
Attorney for Defendant.

Dated December 10, 1886.

Title of court and cause. Notice of motion for new trial. Copy received this 10th day of December, 1886. Arthur Brown, attorney for plaintiff. Filed December 10, 1886. J. M. Zane, clerk, by H. G. McMillian, deputy clerk. P. L. Williams, attorney for defendant.

And on the 22nd day of January, 1887 (the time therefor having been extended to that date by agreement of plaintiff's attorney), the said defendant served on the plaintiff its statement on said motion; which statement, as settled and allowed by the said court, is in the words and figures following, to wit:

(Title of Court and Cause.)

Statement on Motion of the said Defendant for a New Trial.

And to be used as and constitute a statement on appeal from the final judgment in the said action.

The above-entitled cause came on for trial in said court, at the September, 1886, term thereof, before Hon. Charles S. Zane and a jury, on Monday, a. m., November 29, 1886. The plaintiff
8 appeared by Arthur Brown, Esq., and E. B. Critchlow. The defendant appeared by P. L. Williams, Esq. Thereupon the following proceedings were had:

Testimony.

WILLIAM C. REDDON, the plaintiff, being duly sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. CRITCHLOW:

Q. You are the plaintiff in this case, are you, Mr. Reddon?
A. Yes, sir.
Q. Where do you reside?
A. Coalville, Summit county.
Q. How long have you lived there?
A. Lived there about twenty-two years.
Q. What is your age?
A. I will be thirty-eight years old the fifth day of next April.
Q. What is your business?
A. Coal-digger.
Q. What were you engaged in in the year 1885?
A. Working for the U. P.
Q. Union Pacific Railroad Company?
A. Yes, sir.
Q. The defendant in this action?
A. Yes, sir.
Q. Where were you engaged in working?
A. In Grass Creek mine.
Q. When did you go to work for them at that mine?
A. I went to work in 1884, in December, the first day.
Q. At what?
A. At clearing up entry—coal that fell in the entry—clearing it up.
Q. In what capacity were you employed by the company?
A. By the day.
Q. Was it direct employment—by the day, you say?
A. By the day.
Q. What wages were you receiving from them?
A. $2.50 a day.
Q. By whom were you employed—what individual?

A. Mr. Thomas.

Q. Which Thomas?

A. Thomas Thomas.

9 Q. What was his position, as you understood it, at the mine at that time?

A. Well, he was pit boss. He was foreman; had full charge. That was the way I understood.

Q. There was no one over him, at least?

A. No, sir.

Q. Well, what were you set to work at when you first went into the employ of the company in December?

A. Clearing up this entry.

Q. Which entry?

A. The fifth entry—fifth west entry.

Q. Will you explain what you mean by the entry—what is the entry of the mine?

A. Well, it is the entry that goes off from the slope. The slope runs north and the entries run east and west.

Q. The slope, as I understand it, is the main entrance into the mine?

A. Yes, sir.

Q. That runs down at an angle, does it?

A. Yes, sir.

Q. Can you tell about what angle that was?

A. No; I could not.

Q. The entries, as I understand you, run off from the slope.

A. Yes, sir.

Q. In what direction do the entries run?

A. Well, they are called the east and west entries.

Q. At what interval apart are these entries as you go down the slope?

A. About 100 feet, I think.

Q. And they run east and west at right angles to the slope?

A. Yes.

Q. About how far in from the slope does this fifth entry extend or did it at that time?

A. Well, I don't know exactly how far it was. I couldn't say how far it was right to the end.

Q. Whereabouts in the fifty entry were you set to work clearing it up?

A. Between the—between the *the* nineteenth and twentieth.

Q. Is that where you were first set to work?

A. No; no.

Q. That is what I asked you.

A. I was set right in the first part of it—they had got in a little ways, perhaps.

10 Q. About how far?

A. Well, I was trying to think. I never measured it. Perhaps 200 feet.

Q. That is where you——

A. (Interrupting.) That is where I first started.

Q. That is where you first started in?

A. Yes.

Q. Who was with you and assisting you, if any one?

A. At the work?

Q. Yes; the clearing up.

A. Why, there was—I didn't know his name. I can't tell the name that went with me first. I had quite a few partners in that entry.

Q. Had this entry ever been opened before this?

A. Yes, sir.

Q. How long before this, do you know?

A. I do not.

Q. In what condition was it just before you were set to work clearing it up—what caused the necessity for clearing it up?

A. Well, coal had fell off from the rib and the floor had heaved, I suppose was the cause of it filling up—fell off from the side.

Q. Can you give the name of any one who was assisting you clearing this entry up?

A. Yes, sir.

Q. Who?

A. There was Mr. Tangy, was one man worked with me.

Q. Mr. who?

A. Mr. Tangy, Mr. Low, and Mr. Williams.

Q. Which Williams?

A. John Williams, and let's see——

Q. Well, those are all you remember now. What was the object of clearing up this entry?

A. To get the coal out.

Q. What coal?

A. The coal that was in the far end of the entry.

Q. The object of clearing up the entry, as you understood it, was to get out the coal farther in *in* the fifth entry?

A. Yes; to get at the coal farther in; had men working in the entry, you understand it, and was clearing up this entry to fetch the coal out there and was sending it down into the fifth—into the sixth.

11 Q. Into the sixth? Well, as you cleared up this entry, what was done in the way of timbering, if anything, as you went along in?

A. Well, when we got in about——

Q. (Interrupting.) Well, was there any timbering done?

A. Yes; there was; had Mr. Williams timbering yonder, and his son after me, and a man by the name of—well, I am a poor hand to recollect names.

Q. Well, some other man?

A. Yes.

Q. They were timbering——

A. (Interrupting.) After our clearing it up.

Q. After you cleared it up?

A. Yes, sir.

Q. How long were you engaged in clearing this up, if you remember?

A. Well, now, I couldn't say just exactly. To the best of my ability, we was about a month and a half; might have been a little more and might have been a little less.

Q. Somewhere about——

A. (Interrupting.) Somewhere——

Q. About the 15th of January, then, that you quit that?

A. Somewhere about that time, I should judge, as near as my memory will serve me.

Q. Well, what was the condition of the entry as you cleared it up after——

A. (Interrupting.) Well, it was—the rib was falling off more or less all the time.

Q. What do you mean by the rib?

A. Why, the coal was falling off from the rib of the entry, where you come in—the side.

Q. What is the rib?

A. This here (pointing to map) we call the rib—this wall.

Q. Then it is the wall, as distinguished from the roof, is it?

A. Yes. It was falling off this way.

Q. The rib of the entry is the side wall—different from the roof?

A. It is the side wall. It is different from the roof.

Q. You say it was falling off from there all the time?

A. More or less.

Q. What was the cause of the falling?

A. Well, now, because it was too heavy; because of the heave or crush of the mine; that is what I should judge—the weight of the mine being on it—the roof.

12 Q. You said something about crushing. What do you mean by that?

A. Well, I meant that the roof was pressing down on the coal and causes it to fall off.

Q. Was that so all through the entry there where you were clearing it up?

A. More or less.

Q. Well, you mean by that that more or less coal was falling off?

A. All the way in the entry.

Q. All the way in the entry?

A. Yes, sir.

Q. I understood you to say that Williams and some other man timbered after you. Was this timbering continued up to the time when you stopped your clearing up the entry?

A. No; it was stopped just a little before we got in to where the other entry was cleared up, and Mr. Thomas——

Q. (Interrupting.) Wait a minute. You say in to where the other entry was cleared up. Had they been clearing it up from the chamber back toward you?

A. They had been working it inside—working the entry—and throwing the coal down into the sixth lift and taking it out that way, and we was clearing this entry up in order to get the coal out of the fifth in place of sending it down that room.

Q. Then, as I understand, shortly before you met the place where

it was already cleared up, or before you got to that place, they ceased timbering?

A. Yes, sir.

Q. By whose order was this timbering stopped?

A. Mr. Thomas'.

Q. Which Mr. Thomas?

A. Mr. Thomas Thomas.

Q. He was at that time acting as foreman, was he?

A. Yes, sir.

Q. Did you hear any orders given——

A. (Interrupting.) Yes, sir.

Q. With regard to the timbering of this; did he stop the timbering?

A. Yes, sir.

Q. To whom were they given?

A. Given to Mr. Williams.

Mr. WILLIAMS: I object, if your honor please. I think under the pleadings here there is no relevancy in this testimony, as I
13 understand it. There is no averment that any kind of timbering was omitted, or that that caused the injury that is complained of here, and I object to their introducing proof upon that subject, as there is no intimation in the complaint that any omission of that sort existed or was in any way connected with the injury complained of here. The only averment is "that the said defendant" (reads from complaint). Now, I object to the proof with reference to the question of timbering or the cessation of timbering, because there is no averment or intimation in this complaint admonishing the defendant that that was a cause of complaint; no issue of that sort is tendered; no defect of that kind is averred, and it seems to me if that was the character of the negligence which they rely upon or it had any relevancy it was there duty to plead it. In other words, to set out in what the negligence consisted that is the cause of complaint.

(Argued by counsel.)

The COURT: The statement is a general one, that "the said defendant, through its recklessness and negligence, allowed the roof and walls of said mine and its rooms and apartments to become unsafe and insecure, and that said defendant well knew it to be unsafe and insecure," etc. The statement is that the roof and walls of the mine and its different rooms and apartments became unsafe and insecure; that the defendant allowed it to become so, and alleges that that was negligence, but it don't state by what particular omission of duty it became insecure. I am of the opinion that that would allow evidence under it to show the fact that the walls and roof were permitted to become insecure for the reason that they were not timbered or for the reason that the roof or ribs, as the witness calls them, or the pillars that supported them were insufficient. If the allegation was too general, I think the proper way would

have been to have reached it by demurrer. Let the objection be overruled.

Mr. WILLIAMS: I take an exception, if your honor please.

Mr. BROWN: Temporarily we will withdraw the question and put it again after a little more preliminary questioning.

Mr. CRITCHLOW:

Q. You say, Mr. Reddon, you have been in the business of coal-mining how many years?

A. Well, I have been digging coal about fifteen years.

Q. You are familiar with the methods of operating a mine, more or less?

A. Yes, sir.

Q. What is the usual method in operating coal mines of
14 rendering entries or chambers secure from falling coal or from coal which seems to be insecure?

A. Set props to it—putting props to it in an entry where it is insecure; they put props, lagging it behind—fill it up.

Q. Any other methods?

A. No other that I know of, only setting props and lagging, unless they built—of course, if it was going to come in they would build what they call a shanty.

Q. Well, I suppose another method would be that of taking down the coal——

A. (Interrupting.) Why, certainly.

Q. —that was insecure?

A. Yes; they could do that.

Q. Then there were those two methods that you speak of?

A. Yes.

Q. Do they ever use square sets in coal-mining?

A. Well, yes; what we call shanties—square sets—the same thing.

Q. Now, I will return to the original question. What was said, if anything, by Mr. Thomas about the stopping of the timbering of this past of the entry in your presence?

Mr. WILLIAMS: I desire my objection to be interposed, and a ruling and exception.

The COURT: Yes.

Mr. WILLIAMS: To all that class of testimony.

Q. You may proceed, Mr. Reddon.

A. He told Mr. Williams to stop timbering now for the present; he would like to get the track in so that they could get the coal out, and he would timber it afterwards.

Q. Did he give any reason for stopping the timbering then?

A. Well, he was in a hurry to get the coal out.

Q. He said he was in a hurry?

A. Yes, sir.

Q. What coal did he have reference to, if you know?

A. Why, fetching the coal out of the entry.

Q. Out of the back part of the entry?

A. Yes, sir.

Q. At the time when he gave this order to Mr. Williams was the coal running at that time—the trip?

A. No, sir; we hadn't got in then.

Q. You hadn't got in?

A. We hadn't got in; no.

15 Q. Well, this, you think, was about the middle of January, or some time in January?

A. Yes; some time in January when he gave this order.

Q. And it was about the middle of January when you ceased?

A. When we finished the entry, to the best of my knowledge. I couldn't say positively.

Q. Now, where were you employed in the mine and in what duties from that time up till the month of May?

A. I was track-layer; put onto the track with Mr. Moore.

Q. Dan. Moore?

A. Daniel Moore.

Q. By the way, what was his position in the mine?

A. He was boss track-layer, and I was his helper for awhile. Then they put me onto the track and gave me a helper, and he went to looking after the day men in the mine.

Q. What do you mean by day men?

A. Why, men that is working for the company by the day.

Q. Not coal-miners?

A. No, sir.

Q. Well, what was his position with regard to the authority over men in the mine?

A. Why, he set them to work; he was our boss when Tom wasn't there.

Q. Boss under the foreman, Mr. Tom Thomas?

A. Yes, sir.

Q. Well, in what part of the mine did your duties call you as track-layer?

A. All over it.

Q. Under whose orders?

A. Mr. Moore's or Mr. Thompson's; either one.

Q. Were you at any of the time—from the middle of January up to the 25th of May—engaged in working in this fifth entry?

A. Nothing, only as a track-layer, as I was called in, you know, laying track or filling up loose coal.

Q. Well, now, from this time, when you ceased clearing up the entry, until May what was the condition of this entry with regard to the coal upon the roof and ribs?

A. Well, it was what I consider dangerous—falling more or less all the time.

Q. You considered it dangerous yourself?

A. Yes, sir.

16 Q. Were there any particular indications or conditions about the mine which tended to show that any of the entries were dangerous?

A. Well, coal kept falling on the entry from the rib.

Q. Which entry?

A. On the fifth entry. That was the most; that was considered to be the dangerousest entry in the mine.

Q. So considered by the miners, do you mean?

A. Yes, sir.

Q. Or by yourself?

A. By myself and miners, too.

Q. Do you know whether Mr. Moore was ever in this entry between the middle of January and the early part of May?

A. Yes, sir.

Q. He was, was he?

A. Yes, sir.

Q. Do you know whether or not he knew that the coal was falling in there off the ribs?

A. Yes, sir; he knew it was.

Q. Did you ever receive any orders about filling in the coal that had fallen there?

A. Yes, sir.

Q. From whom did you receive orders?

A. I received them from Mr. Moore and also from Mr. Thomas, but mostly from Mr. Moore.

Q. What was the custom there in the mine with regard to clearing up the entry from the loose coal that had fallen down from the ribs? Who did that?

A. The day men.

Q. Under whose directions?

A. Under Mr. Moore's or Mr. Thomas'; either.

Q. Then this coal that was falling from January up till May—all the time—was cleared up under the express directions of either one of these two men, as I understand you?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Moore with regard to this entry?

A. Yes, sir.

Q. I mean now between the time when the timbering stopped—when the clearing stopped—to the middle of May.

A. Yes, sir.

Q. Well, what were the conversations that you had with him?

Mr. WILLIAMS: I object to that, if your honor please. I don't think it appears now that this testimony is admissible. I
17 object to it as irrelevant upon this suggestion: That there is some testimony tending to show that some portion of that time Mr. Moore was in some superior position, as assistant boss, but what portion of that time he was such boss——

Mr. BROWN (interrupting): If I understand your objection rightly, it is that it is hearsay.

Mr. WILLIAMS: It is hearsay now.

Mr. BROWN: We yield it, and we will prove it a little further.

Mr. CRITCHLOW:

Q. What were the duties of Mr. Moore? What was his position

about the mine there at the time when you talked to him with regard to the condition of this entry?

A. Why, he was what we call—he was the boss track-layer. He was over me, and he had charge when Tom wasn't there. He had charge of the men—of anything that he seen it was required to be done.

Q. Well, now, you may go on and state what conversations and during what times, as nearly as you can remember—what conversations you had with him.

Mr. WILLIAMS: I object to that unless it was shown that he was absolutely a vice-principal at this time. It seems by the statement of the witness that he had a controlling position in the absence of Mr. Thomas, and *vice versa*; didn't have a controlling position if Mr. Thomas was there.

Mr. BROWN: We yield to it.

Mr. CRITCHLOW:

Q. Was Mr. Thomas' attention ever called to the condition of the entry at any time after the order that he gave to cease timbering? Was his attention ever called after that to the condition of the entry?

A. Yes, sir.

Q. By whom?

A. By me.

Q. When was that?

A. Well, that was about a week before I got hurt.

Q. I understood you to say that Mr. Thomas was foreman, in charge, during all this time from January up to the middle of May—up to the time of the accident.

A. Yes, sir.

Q. Well, now, you may go on and state what you did by way of calling Mr. Thomas' attention to this entry.

A. Well, hold up. Mr. Thomas was sick a little while, and his brother there, Mr. Gomer Thomas, took his place.

18 Q. Well, while he wasn't sick and about the mine there he was in charge, was he?

A. Yes, sir; in the mine, except while he was sick.

Q. While he was in charge there what did you do by way of calling his attention to the dangerous condition or to the condition of this entry?

A. Why, I told him that the wall—that the entry was dangerous, and if the coal wasn't taken down that somebody would get hurt sooner or later.

Q. Where were you when you called his attention to it?

A. Well, I was in the fifth entry, where I got hurt.

Q. At what time did you say, about?

A. Well, it was some time the fore part of the day.

Q. About what part of the entry was it where you were?

A. Well, when he—when I came to start with him we were right by the air course that goes down into the sixth lift.

Q. About how far away from the slope were you?

A. When I started it was about between nine and ten hundred feet I should judge, as near as I could get at it.

Q. I mean when you called Mr. Thomas' attention.

A. Yes, sir.

Q. Well, now, go and state what was done by you.

A. I took him and told him this coal was going to fall if it wasn't taken down. I was afeard, and I took him in along the road, all the way in, sounded the coal for him, until I got him to the room where Mr. Locke worked—John Locke—and that was the dangerousest place there was, between his rib and the next one, and he says, "Bill," he says, "that won't fall yet. You have no idea how this coal will hang;" and he says, "I can't stop the turn to take it down now, but," says he, "I will take it down some other time." Them was just the words that was used, as near as I can get at it.

Mr. BROWN:

Q. Couldn't stop what?

A. Couldn't stop the turn.

Mr. CRITCHLOW:

Q. What did he mean by the turn?

A. Why, the coal, the trip going out.

Q. He meant by that, then, as you understood him, that he couldn't stop taking coal out?

A. Why, if he took the coal down on the track he couldn't run it. It would delay the coal going out—that is, so fast. He could take some out, but he couldn't take it so fast.

19 Q. Well, how much of this entry did you pass over in showing Mr. Thomas the dangerous parts of it?

A. Well, I couldn't say; somewhere about five or six rooms, I should judge.

Q. About how many feet?

A. Well, I don't know how far it is; there is about sixty feet between each room, I think; somewhere about that, and there was five or six rooms that I showed him.

Q. What was the condition of this part of the entry—of the whole entry—with regard to this falling of the coal?

A. It was more or less dangerous; it fell more or less all the way to where the props were set, but no- — much as it did in where I showed him.

Q. Where you showed him?

A. No.

Q. What more did he say, if anything, than that he wanted to keep the turn running?

A. Why, he didn't say nothing, only as I told you. He said that he couldn't stop the turn then to take it down; that he would take it down some other time—have it taken down. He didn't take it himself, of course.

Q. He said he would take the coal down?

A. Yes, sir; he would have it taken down. He didn't work his own self.

Q. Now, where were you working on the 25th of May? What were you doing?

A. I was—Mr. Thomas ordered me and Mr. Harry Thomas over there to go in and clear up the coal and lower the track.

Q. What time of day was that?

A. It was right after one o'clock.

Q. You were still under employment as track-layer, were you?

A. Yes, sir.

Q. By the day?

A. By the day.

Q. Well, what did you do?

The COURT: Who was it that gave the orders?

A. Thomas Thomas.

Mr. BROWN: Gave the orders to him and Harry Thomas.

Mr. CRITCHLOW:

Q. About what time of day was it?

A. It was right after one o'clock.

Q. Well, what did you do after having received those orders?

A. I went in the entry and staid there until the turn; we was a little ahead of the trip—that is, the turn coming in—the man that drove the cars; staid there until they came in, and Mr. Thomas came in also, right behind the cars, and I asked him if I should start in here, and he says, "Yes; clear right up boys——"

Q. (Interrupting.) Which Thomas do you mean?

A. Thomas Thomas; he says, "Hurry up and clear up, for I want to send coal out here this evening."

Q. Well, then, what did you do?

A. Well, I didn't do no more; I was hurt in about——

Q. (Interrupting.) Well, go on——

A. —five minutes after.

Q. —and tell what you were doing when you were hurt.

A. Well, I was clearing up the coal along the side of the rib that had fell off from the rib, and throwing it into the car so that we could lower the track.

Q. Who was working with you, if anybody?

A. Mr. Thomas; Harry Thomas over there.

Q. Mr. Harry Thomas?

A. Mr. Harry Thomas.

Q. About how long after you had received these orders? How long had you been at work before the accident occurred?

A. Well, I don't think I had been at work there five or ten minutes; just seemed like we just started.

Q. Did you have a car full?

A. No, sir.

Q. Well, what occurred at the time of the accident, so far as you know anything about it?

A. Well, I was shovelling here, as I tell you, and just in the act of throwing the coal in, and the rib came off and catched me right

across my back and crushed me down; when I came at myself again I was——

Q. (Interrupting.) What part of the rib or what part of the coal came off?

A. The rib—the wall, not the roof; the wall fell onto me—came off.

Q. Do you know anything about how much there was of it?

—. No, sir; I don't know only what they told me; it knocked me kind of senseless.

Q. You were knocked insensible, were you?

A. Yes, sir.

Q. Well, what did you next know?

A. The next thing I knew I was in Jack Fadders' arms, laying on the entry.

21 Q. Still down in the mine?

A. Yes, sir.

Mr. BROWN: Jack who?

A. Jack Fadders; that is the blacksmith up there.

Mr. CRITCHLOW:

Q. Well, where were you taken from that?

A. I was taken home.

Q. In Coalville?

A. No, sir; I was living right in Grass Creek; had a house rented under the U. P.

Q. Well, what was your condition after having been taken home?

A. Well, I was put to bed, and staid there until they sent for the doctor the next morning. Mr. Hocker was sent for, but Mr. Harrion came first, between nine and ten o'clock, and said that I had got a severe bruise.

Q. Never mind what he said. Did it hurt you when the coal fell on you?

A. Hurt me? I should smile it did.

Q. Well, can you give an idea of about how badly you were hurt?

A. Well, it hurt me that way that I couldn't move myself at all. I had to be carried home—that is, I was put into a car and drawed up to the top, and the boys carried me home and put me in bed.

Q. How long did you stay in bed—how long were you confined to your bed?

A. I got up out of my bed about the 10th or 11th day of June.

Q. What year?

A. 1885.

Q. The accident was in May, 1885, was it?

A. Yes, sir.

Q. Now, what has been your condition since that time?

A. Well, I have been going around on crutches part of the time. I went on my crutches until somewhere about the 20th of July, and then I went onto a cane, and I throwed away the cane about the last of August, and went without any then—didn't have no cane at all—till I went up to go to work in the mine at Grass Creek for Mr. Thomas here in October some time.

Q. Up at the same mine?

A. Yes; where I got hurt. I asked him if he couldn't get me a job. Gomer Thomas was foreman then, and says he, "Do
22 you think you can go to work?" I says, "I don't know; I want you to give me something that there ain't much work in." He says, "Do you want your old job?" I says, "No; I couldn't do that;" says I, "I need some work, for my folks are destitute." And that very afternoon there was a young fellow got killed in the mine, and I never went down; I went right down with the wagon; told me I could come down in the morning, and Mr. Moore there would find me something to do, and I went right home.

Q. Well, did you ever endeavor to do any work after that?

A. Yes, sir.

Q. What did you do in the way of attempting to work?

A. On the 26th day of October I went to mining coal.

Q. What year?

A. 1885. I went to mining for the Wasatch Company.

Q. Wasatch or Home?

A. Home Coal Co., I guess they call it, and I worked a half shift—tried to work a half shift—and I have never done a tap from that day to this. I went on a cane, and I kept getting worse.

Q. What was the reason you worked only half a shift?

A. Because I couldn't stand the work; I couldn't stand it; I had to go home.

Q. Whereabouts has the injury affected you?

A. In the small of my back.

Q. Well, what is the reason why you can't work?

A. Why? Because I can't use myself; I haven't got power of myself; the pain of it.

Q. Have you suffered any pain since the time of the——

A. (Interrupting.) I should think I had.

Q. Well, how is that, constant or only at times?

A. It is constantly; all the time. I have never been rid of pain since I have been hurt.

Q. Whereabouts is the pain?

A. Right in the small of my back.

Q. What was your physical condition, Mr. Reddon, up to the time you were injured?

A. Well, I used to consider I was a man among men.

Q. Ever been injured in any way about the back?

A. No, sir; not——

Q. (Interrupting.) There is no other cause that you know of for the pain or injury to your back than the one you have mentioned here?

A. No, sir.

Q. You say that along in the fall of 1885 you began to get
23 worse. Won't you tell us how that happened, and in what particulars you became worse?

A. Well; I went to work; that is what made me worse.

Q. This time you went up to the Crismon mine?

A. To the Crismon mine; yes, sir; started to mine, and I have been getting worse ever since.

Q. Well, how are you affected—in what particulars are you worse?

A. Why, I got worse in back; I couldn't use myself, and the pain of my back—couldn't stand to do anything; couldn't do anything at all.

Q. You said you threw away your cane?

A. Yes, sir.

Q. I see you have your crutches. How long have you been walking on crutches?

A. I came to Salt Lake here in December. I went to the county and asked them, after I had been working here to Crismon's mine—I went to the county and asked them——

Mr. WILLIAMS (interrupting): I object to that.

Mr. CRITCHLOW:

Q. How came you to go to on crutches again?

A. Because I couldn't go without them.

Q. About what time did you take to crutches?

A. About what time did I take to crutches? About the 13th day of December.

Q. What is your ability to help yourself in getting about and dressing and that sort of thing?

A. I can't put my shoes on at all. I have to have either the woman or the children do it; have had to ever since I got hurt; ever since I worked up there couldn't put them on.

Q. Do you mean you can lean over to do it?

A. No, sir.

Q. About sitting in a chair. When you are sitting still are you comfortable?

A. No, sir; I am in pain all the time.

Q. From your back?

A. Yes, sir.

Q. This day when you went up to work at the Crismon mine, did you suffer any other accident or have anything befall you there?

A. No, sir; nothing at all.

Q. Simply unable to——

A. (Interrupting.) Yes; unable to work; I couldn't work; I started to mine, but I had to quit it because I couldn't stand it; my back pained me so bad that I just couldn't stand it.

Q. Mr. Reddon, when there is a constant or continuous falling of coal throughout the entries of a coal mine what is generally considered the condition of that entry as to being safe or unsafe?

A. Well, when the coal is falling it is considered to be dangerous.

Q. Well, what is considered to be the necessity for timbering or otherwise?

A. Putting up props or pulling the coal down.

Q. That is the usual course——

A. (Interrupting.) That is the usual course.

Q. —for remedying the defect?
A. Yes, sir.

Cross-examination of WILLIAM REDDON.

By Mr. WILLIAMS:

Q. You say it was the following day after you were hurt before you had a doctor attending you?
A. Yes, sir.
Q. About ten o'clock the next day you say Dr. Harrison first attended you?
A. Yes, sir.
Q. And Dr. Hocker later?
A. Yes, sir.
Q. When was it Dr. Hocker saw you?
A. The next day following that.
Q. The second day, then, after you were hurt?
A. No, no; I got hurt on Monday, and Mr. Harrison came the next day and Mr. Hocker came the next day following after that, would be the third day.
Q. It would be Wednesday, then, that Dr. Hocker came?
A. Yes, sir.
Q. So that that was the second day after you got hurt that Dr. Hocker came?
A. Yes; the second day after I got hurt.
Q. And you remained in bed about fifteen days?
A. I—yes, sir.
Q. How often were you attended by the physicians?
A. They just—Mr. Harrison came to see me once and Mr. Hocker came twice; that was all.
Q. When was Dr. Hooker's second visit, with reference to the first?
25 A. Just—it was either on the 10th or 11th of June; I won't be certain which one of those days.
Q. About the day you got up?
A. Yes, sir; I had been up once before that about two minutes, in the chair.
Q. Have you had any medical treatment or attendance other than those visits?
A. Yes, sir.
Q. What, say?
A. I have had Mr. Benedict—has been waiting on me ever since last December.
Q. Giving you medicine?
A. Gave me some medicine, yes, sir.
Q. You were down here in December, I believe you said?
A. Yes, sir.
Q. Was that the time you went into Dr. Benedict's hands to be treated?
A. Yes, sir.
Q. Did you come down here for that purpose?

A. Yes, sir.

Q. How long were you down here?

A. The county appropriated——

Q. (Interrupting.) I asked you how long you were down here.

A. Why, I just stayed here one day; one or two days, I won't be certain.

Q. You simply had him examine your case, did you?

A. Yes, sir; he examined my back.

Q. And you say from the time that you worked this half day or half shift, up at the Home Company's mine, you began to get worse almost immediately?

A. I have got worse ever since.

Q. And continued to get worse?

A. Yes, sir.

Q. That work was done on the 26th of October last, did I understand?

A. Yes, sir.

Q. And the 13th of December following that you took to crutches again?

A. Yes, sir.

Q. And have used them ever since——

A. (Interrupting). Yes, sir.

26 Q. Do I understand you? Been ever since in a good deal the same condition as you appear to be now?

A. Well, I have been a little better than I am now; I have got cold in my back and a little worse.

Q. Now, at the time you received this injury you were thirty-six years old; you will be thirty-eight next April?

A. Yes, sir.

Q. Then you were thirty-six in April before you were hurt in May; that is right, is it?

A. Let's see, it has been——

Q. It will be two years next May since you were hurt?

A. Yes, sir; that is correct.

Q. And you had been engaged as a coal-miner about fifteen years?

A. Yes, sir; might be a little longer than that; I wouldn't be right to a day, understand.

Q. So you commenced coal-mining when you were quite a young man?

A. Yes, sir.

Q. Twenty or twenty-one, somewhere along there?

A. Yes, sir.

Q. Where have you been engaged during those fifteen years?

A. I have worked around Coalville.

Q. In the different mines about there?

A. Yes; Grass Creek.

Q. Has all your work in mines been in that locality, in Summit county?

A. No, sir; I have worked in Pleasant Valley.

Q. Pleasant Valley?

A. Yes, sir.
Q. Worked any over in Wyoming?
A. Yes, sir.
Q. At Almy?
A. Yes, sir; the old Wyoming mine.
Q. And at Rock Springs?
A. Yes, sir; and at Rock Springs.
Q. So that from the time that you began mining when you were quite a young man up to the time of this accident, that was your business, was it?
A. Yes, sir.
Q. About what portion of that time have you been an actual coal-digger?
A. Why, I have been digging the bigger part of the time.
27 Q. At the time that you began work in this mine, December 1st, 1884, you began as a company man?
A. Yes, sir.
Q. A day hand?
A. Yes, sir.
Q. To do the irregular work through the mine?
A. Whatever I was ordered to do.
Q. I would be obliged, Mr. Reddon, if you would allow me to move your chair about here, so that you can look up at this plat. Now, looking at this plat, Mr. Reddon, state whether or not that conveys a general impression of the slope of this mine, down here, to levels or entries running off eastward, these places, the rooms, extending up from each level. Is that something like the condition of that mine?
A. That looks something similar to it.
Q. That, then, would give a kind of general idea, would it, this being——
A. (Interrupting.) Well, I don't know. I am turned around a little in here.

Mr. CRITCHLOW: Mr. Williams, is that a plat or a section?
Mr. WILLIAMS: It is a section, extending right down through the mine, to show each entry.
Mr. BROWN: Is it a projection of the slope to a vertical plane?
Mr. WILLIAMS: That is it.

Q. Now, I wish you would state in what direction that slope extends down, as you go down it, and which direction you travel—that is, with reference to the points of the compass.
A. Well, I couldn't come right exactly at it.
Q. Well, now, will you state about what the inclination of that slope is?
A. No, sir; I don't know; never measured it.
Q. I wish you would take your crutch, then, and indicate to the jury about the——
A. (Interrupting.) Pitch?
Q. About the pitch, approximately.
A. Well, I should judge it was something about like that, as near

as I could get at it (pointing); might be a little steeper and it might be a little flatter.

Q. It isn't as steep as a half pitch?

A. No.

Q. Falling a foot in a foot?

A. I don't understand the pitches at all.

28 Q. Well, what I want to ask now is, in going down that slope does the slope run down to the westward or to the northward?

A. Well, now, I can't tell you, for I don't know exactly the—don't know whether it runs exactly north or south; it is running north and south; they call the entries east and west.

Q. Call the entries east and west?

A. Yes; but whether they are right on the compass I couldn't say.

Q. Are you turned around some up there—that is, are you unable to tell the exact points of the compass on account of the mountains being situated as they are?

A. No; only as I don't understand it.

Q. Now, on the fifth entry this accident happened?

A. Yes, sir.

Q. (Pointing on map.) Here is number five entry marked here. Now, then, I understand you to say that when you began working there, on December 1st, 1884, you then began work in this fifth entry?

A. Yes, sir.

Q. And at a point about 200 feet from the slope?

A. Well, as near as I could come at it; might be a little more.

Q. Somewhere near that?

A. Yes, sir; and might be a little less.

Q. A little more or a little less?

A. I wouldn't say.

Q. And what was the character of the work which you did then?

A. Filling up the coal that had fell off from the rib.

Q. Had there been a car track laid in that entry before that?

A. The entry had been worked before and it had heaved and it fell up.

Q. Was the track there at the time?

A. Some of the track—some kind of a track was there.

Q. Well, now, had it filled up entirely by the heaving?

A. Not right entirely.

Q. But some places it had heaved more than others?

A. Yes, sir.

Q. So that heaving, I understand, there was a bulging up of the floor?

A. Of the floor; yes, sir.

Q. What was the substance of the floor of the mine there?

A. It was clay.

Q. Common clay?

29 A. Yes, sir.

Q. Softer than the roof?

A. Yes, sir.

Q. Then, in clearing out this coal that had fallen off the ribs, did you do anything else with reference to taking out the coal at the bottom?

A. Yes, sir; we had to take out coal on the upper side.

Q. And level it, I suppose, along near the rib for the track?

A. Yes, sir.

Q. And relay the track?

A. Yes, sir.

Q. Did you assist in that work also—relaying the track?

A. I did; sometimes on my shift it was laid, and sometimes on the opposite shift.

Q. So that your work was in removing clay and coal as fast as necessary along close to the ribs?

A. Yes, sir.

Q. And relaying the track, so that the entry could be used?

A. Yes, sir.

Q. And at the time you began that this entry wasn't being used out to the slope?

A. No, sir.

Q. But away at the farther end they were mining coal, as I understand you, and putting it down through the opening into the sixth lift?

A. Yes, sir.

Q. And bringing it out to the slope and up from there; that was the fact?

A. Yes, sir.

Q. (Pointing on map.) Now, this line right along here, that appears to be a continuous opening of the entry itself, and these large blocks just above that represent what you call the rib, do they not?

A. Yes, sir; that is the rib, and them openings would be the rooms, I should judge.

Q. The openings would be the rooms?

A. Yes, sir.

Q. And then, after the rooms were started in and got a few feet, they widened out a little, did they?

A. Yes, sir.

Q. Then these figures here which represent a narrower opening near the entry, and then widening after passing in a few
30 feet, substantially represent the condition and shape of the rooms, do they?

A. Yes, sir.

Q. And these openings across, just back of these large blocks here, were openings through from one room to the other back of the rib, were they not?

A. Yes, sir.

Q. Now, then, these ribs, as you call them, then were the columns of coal that stood on the upper side of the entry?

A. Yes, sir.

Q. And the face of those columns is what you, in miner's language, call the rib?

A. Yes, sir.

Q. So that going along in the mine the rib would be represented by this solid wall between, and the openings here represent the openings into the rooms on each side?

A. Yes, sir.

Q. That is about the condition?

A. Yes, sir.

Q. Now, from the point that you began work here—say 200 feet or thereabout—when you began, December, 1884, and continued for about six weeks, you were kept working right along the level westward?

A. Yes, sir.

Q. About how far had you reached from the slope at the time that you ceased that work?

A. Well, we had when we quit working there——

Q. Yes, sir.

A. —about nine—well, I don't know how far the entry was—just how far the entry was in.

Q. Worked on past a good many rooms, had you?

A. Oh, laws, yes.

Q. Quite a number?

A. Yes, sir.

Q. And at the time that you quit you had worked out to a point so that coal could begin to be brought out that way?

A. We worked to where we made the track on the inside—where they drove the entry along.

Q. Do you know of an opening down into the sixth to the fourteenth room?

A. There is an opening. What the number of the room was I couldn't say, sir.

31 Q. Where was it that you ceased work with reference to that opening down to the sixth? Were you near that opening below down to the sixth when you quit work?

A. No; when we quit in there—the track was narrower inside; understand that they had been putting the coal down into the sixth, and we had to tear up that narrow track and put our track straight in along there.

Q. Straight in along there?

A. Yes, sir.

Q. And of course you were not expected to cut off this coal and take up loose matter——

A. (Interrupting.) No, sir.

Q. Because that was in order, that part of it?

A. Yes, sir.

Q. Now, you say there was some men following you when you were clearing up this entry, Mr. Williams and his son and some others, perhaps, at different times, putting in timbers?

A. Yes.

Q. Props?

A. Yes, sir.

Q. How far behind you were they working?

A. Right up——

Q. (Interrupting.) Came right along?

A. They came right up with us; they didn't prop it all the way, understand.

Q. But please——

A. (Interrupting.) Where it was required, where we started.

Q. Who selected the place for putting timbers?

A. Why, Mr. Thomas told them where to start.

Q. And as they went along from place to place——

A. (Interrupting.) Why, it was timbered all the way as far as they did timber it, right straight along.

Q. As far as they did timber it——

A. (Interrupting.) Yes, sir.

Q. —they timber it all the way?

A. Right straight along.

Q. And how far was it back to where you ceased working at the time that you made the connection here with the portion of the entry that was in order? Did they stop timbering or did they timber up to the point?

A. No.

Q. They stopped back of that some distance?

A. They stopped back of that, sir.

32 Q. Then they stopped timbering before you got through with that job?

A. Yes, sir.

Q. About how far back of where you finished up that job in that entry was it that they stopped timbering?

A. Well, I was just trying to think. I swan I couldn't come at it. I never measured it, you know.

Q. Well, then, about how long was it before you got through with your job there that they quit timbering?

A. Why, they quit—he quit timbering when I was working—stopped when we was working.

Q. Yes; I know; but did he quit before you went on and finished your job, say the 15th——

A. (Interrupting.) Yes.

Q. —of January?

A. He quit timbering before we got through in the entry.

Q. Now, how long before you ceased working there before the job in that place was finished up?

A. Why, it wouldn't be—I should think we wasn't over a week putting it in, until we met the other track, after they stopped timbering.

Q. After they stopped timbering?

A. No; to the best of my ability——

Q. And at the time he stopped he was pretty close up to you?

A. He was right up to us.

Q. But all the time your work there in that entry necessarily had to be carried on ahead of the timbering, didn't it?

A. Yes, sir; the entry had to go ahead of the timbering.

Q. The cleaning up?

A. Yes, sir.

Q. Because you had to put it in order to be timbered up?

A. That's what.

Q. Now, when you completed that job, say the 15th of January, or about that time—it is not material as to what time—what did you immediately go at after that?

A. Laying track with Mr. Moore. He put me on the track with Daniel Moor.

Q. That was the next regular——

A. (Interrupting.) Yes, sir.

Q. —job that you was put at?

A. Yes, sir.

33 Q. Now, I wish you would explain to the jury all the kinds of work that you did and had to do as a track repairer or layer or assistant.

A. Well, I had whenever the track was out of order anywhere—the boys got off from the track—I had to repair it, and we laid the switches in the rooms—where they would open up a new room, of course, when they got the shute hole dug out, they would want for us to lay it, and I would lay it.

Q. Lay a track in there to put their car in?

A. Yes, sir.

Q. Where they filled them?

A. Yes, sir.

Q. How long did they continue at that job then?

A. I continued at that job until I got hurt.

Q. Until you got hurt?

A. Yes, sir.

Q. Well, now, your work then as trackman called you in all different places in the mine where there was track, did it?

A. Yes, sir; it did.

Q. So you couldn't tell from one day to another where you would be working?

A. No, sir; I had to go wherever I was ordered.

Q. Your work in connected with the track was almost exclusively in the entries or very near to the entries, was it?

A. Well, it was mostly in the entries; of course sometimes it was on the slope, when it was out of repair.

Q. But generally in the entries?

A. Generally in the entries.

Q. And in making these turns into the rooms that piece of track would be only short?

A. Yes, sir.

Q. Just go in a little distance so as to clear the entry and lay the track?

A. Yes, sir; so that they could load the car.

Q. And then the method of running the mine was in opening the entry and working up the vein?

A. Yes, sir; up the grade.

Q. Up the grade on the vein and dropping the coal down to the entry?

A. Yes, sir.

Q. Now, during the time after you stopped this particular job and was engaged as a track-repairer was this heaving or bulging going on occasionally in different places in the mine?

A. Yes, sir.

34 Q. And this falling of coal in the different entries was something that was frequent?

A. Yes, sir.

Q. Went on in all the entries, did it?

A. Well, not so much as it did in that; it fell—the most that fell was in the seventh and in the fifth.

Q. In the fifth?

A. Yes.

Q. Was it in those two entries that the crush was most plainly going on?

A. Yes; there was more coal falling in those entries.

Q. More coal falling; that was what it was attributed to by miners, was it—the crush?

A. Yes, sir.

Q. The effect of the crush there, as I understand it, was to settle the pillars or the ribs into the bottom?

A. Yes.

Q. The bottom was softer than roof?

A. That is the way I understand it.

Q. And that caused a bulging or heaving of the clay below?

A. Yes, sir.

Q. That is a condition very well known to coal-miners, is it not——

A. (Interrupting.) Yes, sir.

Q. —and in different mines? It is a condition that they are familiar with.

A. Yes, sir; never saw it before until I saw it there.

Q. But you have heard of it among miners?

A. Yes, sir; among miners.

Q. That is the only mine in which you have seen a crush?

A. Yes, sir; that is the only one.

Q. Was this first of July, 1884, the first time you ever worked in that mine?

A. No, sir; I worked in there at the time Mr. Qualey was there.

Q. How long was that before this?

A. Well, about——

Q. (Interrupting.) Two or three years, wasn't it?

A. Two or three years, I guess—about three years.

Q. Was this crush going on in any part of the mine then?

A. Not so much so.

Q. Not so much so?

A. Not so far down.

35 Q. They hadn't got so far down—there wasn't so much weight about it?

A. No, sir.

Q. Now, you say that after you had concluded this job in the fifth entry, of repairing it, at the time you began work, and the 25th of May following, the time that you got hurt, you had called Mr. Tom Thomas' attention to the condition of that entry?

A. Yes, sir.

Q. Do you remember how often during that time you had spoken to him about it?

A. No; I don't. I only spoke to him once.

Q. Only once, that you remember?

A. Yes, sir.

Q. And when was that?

A. I think it was a week before I got hurt.

Q. About a week before you got hurt?

A. Yes, sir.

Q. And during all that time the coal in that entry was falling every now and then?

A. Yes, sir.

Q. Quite frequently?

A. Yes; it fell nearly every day.

Q. Nearly every day, some place in the entry?

A. More or less, some place in the entry.

Q. You working on track was familiar with that fact, were you not?

A. Yes, sir.

Q. And when it fell there what man was it that took out the coal that fell from time to time in that entry and other entries?

A. Day men—men that worked by the day. They was always called to fill up all the loose coal that had fell on the entries.

Q. Did you assist in doing that?

A. I did some.

Q. So that in connection with your track-work you also assisted in——

A. (Interrupting.) Loading up loose coal.

Q. Loading up loose coal?

A. When there was no track out of repair I was generally put to work at this.

Q. So that you went from one job to another as business required?

A. Just those two; nothing else.

Q. Oh, just those two?

36 A. Well, and I have set a few props up.

Q. That was exceptional, however, was it——

A. Yes.

Q. —that you set props, but your work was, in the first place, on the tracks and repairing the entries where it was necessary?

A. Yes, sir.

Q. If there had been a bulge, then you were called——

A. (Interrupting.) To fix the track.

Q. To level it down?

A. If the floor heaved, why they generally called on us—the hands—to fix it.

Q. And then in connection with that sometimes you had to take away coal?

A. Yes, sometimes.

Q. And then, when you were not engaged on the track, if there was no track needed fixing and there was coal down, why you were put at that?

A. Yes, sir.

Q. What was the usual rule, Mr. Reddon, with reference to finding coal down in the morning on that entry?

A. Well, there would generally be coal there every morning.

Q. Having fallen from the ribs?

A. Yes, sir.

Q. So that it was usual——

A. (Interrupting.) Yes, sir.

Q. —each day to remove more or less coal that had fallen?

A. More or less every day—near about. Some days there wouldn't but as a rule they did.

Q. And that was the condition during all this period, from the time that you went there in December up to the time of your accident?

A. Yes, sir.

Q. Continuously?

A. Yes, sir.

Q. You don't remember to have called Mr. Thomas' attention to it only the one time—about a week before you——

A. (Interrupting.) That is all I can——

Q. (Interrupting.) What was there that induced you to call his attention to it on that occasion?

A. Why, it seemed so much heavier than usual.

Q. It seemed to be falling a little more than usual, do you think?

37 A. I took the pick and tried it; that is what made me call his attention to it.

Q. Had it about that time been falling more than usual, do you think?

A. Why, I think it had a little.

Q. Think it had a little?

A. Been a difference.

Q. Where were you at that time that you had this talk with Mr. Thomas, were you in the fifth entry?

A. Yes, sir; I was in the entry and called his attention when he came in.

Q. You were working there at that time, were you?

A. Yes, sir.

Q. And he just came along on his business?

A. Yes, sir.

Q. He was through the mine more or less every day, was he?

A. Yes, sir; more or less.

Q. And you were working there all this time, about a week beforehand, and he came through the entry?

A. He came through the entry; yes, sir.

Q. And you then called his attention to it?

A. I did.

Q. About what point in the entry were you, if you remember, where that conversation took place?

A. Why, it was near—he was coming along in, you know, and I says, "Tom, if you don't take the coal down off from these ribs somebody will be catched." He says, "Bill, where is it bad?" So I took the pick along and showed him, more especially right to Mr. Locke's room.

Q. And about how far was that from the slope?

A. Well, that is about——

Q. Near the place you got hurt?

A. Oh, it is considerable farther than where I got hurt. I don't know the number of the rooms.

Q. But it was beyond?

A. Yes, sir.

Q. What room was it you was hurt at?

A. Between nineteen and twenty.

Q. Between nineteen and twenty?

A. Yes, sir.

Q. Was it near this place where there was an opening down through there?

38 A. Yes, sir; I think it was right close—there was just an air course just on this side of where I was hurt.

Q. Towards the slope?

A. Towards the slope; yes, sir.

Q. That would bring it, th-n—if that is room nineteen and that is twenty (pointing on map), then you would be hurt right in there; and if that is represented, that air course down through here—that would be about right, wouldn't it?

A. Yes, sir; I think it was somewhere about there.

Q. Now, then, from this air course, where were you at the time you had this talk with Mr. Thomas?

A. Well, he came in when we was working, somewhere right along in——

Q. (Interrupting.) Near this air course?

A. No; a little further in.

Q. Farther over this way (pointing on map)?

A. Farther towards the——

Q. (Interrupting.) Face of the entry?

A. Face of the entry.

Q. Farther away from the slope?

A. Yes, sir; a little farther in.

Q. A little farther in?

A. Yes, sir.

Q. Now, who was there at the time?

A. Mr. Thomas—Mr. Thomas was working with me; Tom Thomas' son, Harry Thomas; he was my helper on the track.

Q. Harry Thomas was working with you?
A. Yes, sir.

Mr. CRITCHLOW: Do you refer now to the time he called his attention?
Mr. WILLIAMS: Yes.

Q. The time when you called Mr. Tom Thomas' attention?
A. Yes, sir; he was working there.
Q. Mr. Harry Thomas was working with you at the time?
A. Yes, sir.
Q. And he was also with you at the time you got hurt?
A. Yes.
Q. He was your partner, as you call him?
A. Yes, sir; he was my helper on the track.
Q. Was there any other person present but you three?
A. Oh, laws, the entry was full; all the miners was working around there.
Q. And they worked in twos and twos, did they, where they
39 were shoveling?
A. Yes, sir.
Q. And others were near by?
A. Yes, sir; miners were generally on the entry, more or less, back and forth.
Q. Yes, but what I ask, Was there any other person present at the time you had this talk with Mr. Thomas?
A. I can't tell about that.
Q. You can't say that there was anybody near enough to hear the talk?
A. We didn't have no talk—didn't stop.
Q. You walked right along with him a little ways?
A. Walked right along with him.
Q. And as you walked along you had your pick and tried the coal, did you?
A. Yes, sir.
Q. On the different ribs?
A. On the different ribs.
Q. About how many ribs?
A. Well, I should judge four or five.
Q. Will you explain to the jury how it is that you try the coal to see whether it is to fall or not.
A. The same as I had a pick and that was the rib, I tap it like that (illustrating), and if it is ready to fall it will sound hollow, and if it isn't it won't.
Q. And that is a test that miners are in the habit of making, is it?
—. ——.
Q. Their ear becomes accustomed to the sound——
A. (Interrupting.) Yes, sir.
Q. —when the coal is giving or loosening?
A. Yes, sir.
Q. And you wacked along with him and tested——

A. (Interrupting.) Yes, sir; — we was going along I would say, "Look here, this is bad, Tom; look here," and went along until I took him to this Mr. Locke's room; that was more dangerous than any of the rest.

Q. And that was some distance farther in——

A. (Interrupting.) Yes, sir.

Q. —from the slope than where you got hurt?

A. Yes, sir.

Q. How far was it from the place you got hurt back towards the slope before you would come to timber at the time you got hurt?

A. Well, I can't say. I should think it was about——

Q. (Interrupting.) About how many rooms?

A. Oh, I don't know.

Q. Well, estimate it the best you can.

A. I think it was three or four hundred feet—two or three hundred feet, I should judge.

Q. The place you got hurt, some two or three hundred feet back this way (pointing on map) before you come to where the timber extended to?

A. Yes, sir.

Q. At the time that you was hurt were you acquainted with the condition of the timbers back here, where they stood?

A. How do you mean?

Q. That is, as to whether they were in position or whether any of them had buckled or knuckled down?

A. Some of them had broke.

Q. The crushing process going on——

A. (Interrupting.) Had broke them.

Q. —broke them and splintered the- and buckled down?

A. Make them bend.

Q. And that was the condition in which some of them were at that time?

A. Some of them were; yes, sir.

Q. And what did Mr. Thomas say in reply to your——

A. (Interrupting.) I took him back and tried the coal for him, and says he, "Bill," says he, "that won't fall yet;" he says, "You have no idea how this coal hangs;" he says, "I haven't time to stop the turn; I must have it taken down some other time."

Q. Now, what character of work were you doing at that time—when you had the talk?

A. I was on the track.

Q. On the track?

A. Yes.

Q. Was you shoveling in coal?

A. Loading up coal.

Q. At that time you was loading?

A. We was loading coal at that very time.

Q. The coal that had fallen?

A. The coal that had fallen from the ribs; yes, sir.

Q. Now, at the time when you had that talk, about a week before

you were hurt up there, were you in this entry, more or less, and working there?

41 A. I was on the track, more or less; I don't know whether I filled any coal up during that period or not.

Q. Couldn't say?

A. Couldn't say, because I was called——

Q. (Interrupting.) At the time, though, that you had the talk with him you were engaged on that day filling up coal that had fallen?

A. Yes, sir; filling coal.

Q. And on the day that the injury occurred what was his order to you?

A. To go into the fifth entry and fill up the coal and lower the track.

Q. And lower the track?

A. Yes, sir.

Q. What was the particular necessity for lowering the track at that particular time?

A. Well, it was heaved up; throwed the cars off from the track.

Q. That is, it would come up in bulges, would it?

A. Heave up at the sides, you know, and it was liable to throw the cars off of the track so that the driver couldn't get out.

Q. That would bend the rails, would it, in bows, upward?

A. No, no; it didn't heave enough to bend the rails.

Q. But it put them out of true?

A. It put them out of true so that they wouldn't keep the track.

Q. At that particular place there at that time was it necessary to clear out the track and the coal next to the rib and move the track next to the rib? Was that necessary?

A. That was the orders.

Q. And that was necessary?

A. Yes, sir.

Q. Move it in nearer the rib?

A. Take and fill the coal up and then cut down the track and move it up, because it would catch the rock if it didn't.

Q. The slope of the roof, of course, is like the slope that you walk down?

A. Yes; that is it.

Q. And the car coming along under here, the roof, at the lower side of the entry was a good deal lower than up here (pointing on map)?

A. Yes, sir.

42 Q. And then, when the heaving came, the car would be liable to catch at the lower side?

A. Yes; we always moved them towards the rib?

Q. Towards the rib?

A. Whenever we have lowered it we generally swung it towards the rib—the rib.

Q. And on this day when you went in there he didn't indicate the particular place that you should commence work in the fifth entry?

A. He says, when I came to the top, "Bill," says he, "I want you to go into the fifth; you and Harry." I says, "Where will we start?" "Well," he says, "somewhere between nineteen and twenty; somewhere thereabouts."

Q. Somewhere between nineteen and twenty?

A. Yes, sir.

Q. Gave you a general idea of where he wanted you to go?

A. Yes, sir.

Q. He didn't accompany you when you went in and started work?

A. He came in when I started work.

Q. You had selected the place, though?

A. No; I was standing right side of the track waiting for the car to come in there, and Tom came along, and I says, "Will we start here?" And he says, "Yes; start here."

Q. And the coal was down there then against the rib, was it?

A. Yes, sir.

Q. That had fallen?

A. Yes, sir.

Q. About what amount was there—enough to fill a car?

A. Oh, well, we was filling it along; it would have filled it. Of course, it wasn't all right in one chunk, you know. When it was off of the track they would throw her so as to get the cars up.

Q. In other words, it fell along from time to time and they would throw it back to the rib?

A. Yes, sir.

Q. And then, when there was sufficient, they would come along and order the car to fill it in?

A. Yes, sir.

Q. And that is what you were engaged in at this time?

A. That is what we were engaged in at this time.

Q. Mr. Thomas came in and indicated that that was a proper place to start in and went on?

A. Yes, sir.

43 Q. He went on his way?

A. He went right straight in the mine.

Q. A very few minutes after that, while you were loading the first car——

A. (Interrupting.) Yes, sir.

Q. —the fall came and crushed you down?

A. Yes, sir.

Q. You were at the time standing between the rib and the car on the track, were you?

A. Yes, sir.

Q. And where was Mr. Harry Thomas—around facing you?

A. He was standing in the front part of the car—standing on the track and loading on the front part of the car, and I was between the rib and the car loading.

Q. And, of course, when the fall came and crushed you down you couldn't give any further account of the situation?

A. No, sir; that was all.

Q. And couldn't tell yourself how much coal fell on you?

A. I could not.

Q. When you started in there to fill up and shoveling there did you give any attention to the rib right beside you?

A. No, sir.

Q. You didn't sound it?

A. No, sir.

Redirect examination of WILLIAM REDDON.

By Mr. CRITCHLOW:

Q. I understand you to say, in answer to Mr. Williams' question, that you only called the attention of Mr. Thomas to the entry once, and that was four or five days before the accident?

A. Yes, sir; that is all I have—I can recollect anything about calling his attention to it.

Q. Well, was Mr. Thomas' attention ever called to the entry in your presence before that time?

A. No; not that I know of.

Q. I call your attention back to the time when he, Mr. Williams, called his attention or something.

A. Why, certainly.

Q. Did he ever call his attention to it?

A. He told him the props——

Q. (Interrupting.) Was that in your presence?

A. Yes, sir; that was in my presence.

44 Q. Then go on and state what it was.

A. That was when he stopped propping, and when he came in he says, "You will have to stop. I want to get this coal started out, and I will prop it afterwards." That is all that ever——

Q. (Interrupting.) What did Mr. Williams say to him at the time?

A. Well, he said if they didn't prop it the chances were somebody would be hurt?

Q. Then, after that, or before that, did Mr. Thomas say that he would prop it afterwards?

A. Why, it was right at that time he said it.

Q. Was it after Mr. Williams had spoke*d* to him about it or before that?

A. No; it was after Mr. Williams had spoke to him.

Q. This place up in here, did you indicate between what rooms it was that—what room it was that you called Locke's room?

A. No.

Q. Can't you remember?

A. I don't remember where it is.

Q. But you say that was the most dangerous one in the mine?

A. Yes; where Locke was I considered was the most dangerous.

Q. Do you know whether any steps were taken to prop up the coal at that room?

A. None that I knew anything about.

Q. At any of these places that you indicated as particularly dan-

gerous to Mr. Thomas were any steps taken to timber up or prop up any of this coal?

A. No, sir; no propping done at all.

Q. At the time when you walked along with Mr. Tom Thomas you say Harry Thomas was your helper?

A. Yes, sir.

Q. Do you know whether or not he walked along the entry with you as you called the attention——

A. (Interrupting.) No; he staid back—sat down and staid back there to work.

Q. So far as you know, then, he couldn't have heard what you were saying to Mr. Thomas?

A. Not——

Q. Or what he said in reply?

A. Not as I know of; of course I didn't pay no attention. Tom was often talking to me and me to him. I just went right along.

45 Q. I will ask you whether there was any other place for you to stand in loading up the coal that had fallen off the rib there than where you did stand, between the car and the rib.

A. I couldn't very well; I couldn't reach it over the car, and consequently I had to stand between the car and the rib.

Q. In order to get at the coal?

A. In order to get at the coal to fill it; of course the coal that was laying between the car and rib—if it had been behind I might have stood on the track and throwed it the same as Harry did.

Q. About how often, on an average, would you say that Mr. Thomas went through this entry here, along from the slope on past room ten and twenty there, through the day?

A. Oh, he was in nearly every day.

Q. About how often did you ever notice him in there?

A. I used to see him every day or so. Of course I was all over the mine; I wasn't right in that entry, understand, all the time; I was called all over the mine.

Q. But when you were in there——

A. (Interrupting.) I have noticed him in there nearly every time I would happen to work in the mine; he was in nearly every day.

Q. As foreman, where did his duties carry him in the mine?

A. Well, all over.

Q. All over the mine?

A. Yes.

Q. And what was his custom with regard to fulfilling his duties as foreman; was he at different parts of the mine?

A. Why, he was generally around the mine, all through the entries, as a rule; when he did come down he took a walk around. I have seen, I guess, in nearly every entry in the mine at different times.

Q. When you ceased work, about the middle of January, Mr. Reddon, along in here and made the track from the other side had you gotten as far in the entry as this room nineteen and twenty?

A. No—yes—no; the chute was on this side of us—on this side of nineteen and twenty.

Q. What do you mean by "on this side"?

A. Towards the slope.

Q. And you stopped at about the chute, did you—right at the chute?

A. Yes, sir; there is where they made the connection; right at the chute.

Mr. WILLIAMS: Fourteenth room?

46 Mr. CRITCHLOW: I think it is the eighteen.

Mr. WILLIAMS: Oh, yes; it is.

Mr. CRITCHLOW:

Q. What were your duties, Mr. Reddon, as track-layer, with regard to timbering; was it your duty to timber?

A. Not unless I was ordered.

Q. Did you ever timber?

A. I have, sir; I have set a few props.

Q. At your own suggestion or at the express order of the——

A. (Interrupting.) Always at the order of either Mr. Moore or Mr. Thomas; they was my bosses.

Q. What was the custom in that mine with regard to trackmen or day men calling the attention of the foreman to the loose coal? Was it their business to sound the coal—to call their attention to it?

A. Not that I know of; I never had no orders to that effect.

Recross-examination of WILLIAM REDDON.

By Mr. WILLIAMS:

Q. You stated, Mr. Reddon, to Mr. Critchlow that at the time Thomas gave orders to Mr. Williams to cease timbering and that he would timber it afterwards. I understand that order was given about January?

A. It was—yes; it was in January; yes, sir.

Q. A week or so before you made the connection?

A. Yes, sir.

Q. Did he say when he would timber it?

A. No; he didn't; only he said when he got through.

Q. Timber it afterwards?

A. Timber it afterwards; after he made the connection and got the coal going out.

Q. There was no further timbering down there, though, up to the time you were hurt?

A. Nothing; only some props set—a few scattering props set in the entry of the roof.

Q. Just a few scattering props?

A. Yes, sir.

Q. But they didn't continue that timbering along there any after he stopped it in January?

A. No, sir.

Q. At that time you went along there—about a week before your

injury—and had this talk with Tom Thomas and he told you
47 not to stop to pull that coal down then, that he would do it afterwards, did he say when he would do it?

A. No, sir; he didn't.

Redirect examination of WILLIAM REDDON.

By Mr. CRITCHLOW:

Q. Mr. Reddon, was it the duty of the track-layer at any time without orders to take down the coal from the rib where he saw it was dangerous?

A. No, sir.

Q. To whom did that coal *it* belong?

A. It belonged to the company.

Q. As distinguished from the coal that the miners got out?

A. Yes, sir.

Q. Was it their duty to sound the roof and see whether it was safe or dangerous?

A. Not—I never had no orders to that effect.

Q. How long would it take after the time that Mr. Williams was ordered to stop timbering—how long would it take to make that connection after that?

A. How do you mean?

Q. When Mr. Williams stopped timbering there I understand Mr. Thomas said that he would timber or would fix it or prop it after the connection was made.

A. Yes.

Q. About how long would it take to make that connection at that time?

A. I think we were something about a week; we might have been a little more, but I won't be positive about that, for I never set no memorandum down, nothing of that kind. In fact, I couldn't; I ain't got no scholarship to do it with.

Mr. WILLIAMS:

Q. You never received any orders to sound the ribs?

A. No, sir.

Q. You did sound them sometimes?

A. Yes, sir.

Mr. CRITCHLOW: This deposition of John Lawrence we now offer.

Mr. WILLIAMS: I think I make no objection. I find some of the answers are not responsive.

Mr. BROWN: Some of it, I think, would be admissible only
48 as rebutting. If there is objection, we will withdraw it and put it in as rebutting.

Mr. WILLIAMS: No; I don't think I will object to it.

Said deposition was thereupon read to the jury, the direct examination being read by Mr. Critchlow and the cross-examination by Mr. Williams, as follows, omitting all merely formal parts:

(Title of Court and Cause.)

Direct Interrogatories to be Propounded to John Lawrence, a Witness to be Called and Sworn on Behalf of the Plaintiff.

First Interrogatory. State your full name, age, occupation, and present residence.

A. John Lawrence; age, thirty-five years; carpenter; Blakely, Custer Station, Northern Pacific railway, Yellowstone county, Montana Territory.

Second Interrogatory. If you state that you are a miner, state whether you have been engaged in coal-mining; and, if so, in what capacities, and for how long a period of time.

A. I have been engaged working in coal mines three years—carpenter-work part of the time and assistant sulphur boss part of the time.

Third Interrogatory. Were you employed, and how, on the 25th day of May, 1885?

A. In the mine, on the 25th day of May, 1885, on the sixth level, when the accident took place. I was working for the defendants in the Grass Creek mine, Utah Territory.

Fourth Interrogatory. If you state that you were working in the employ of the defendant in the Grass Creek mine, Utah Territory, state what your duties were and in what part of the mine you were working upon the 25th of May, 1885.

A. My duties were as before stated, which duties took me all over the mine at any and all times; consequently I had no particular place in the mine.

Fifth Interrogatory. State whether you know the plaintiff in this action, and whether you were acquainted with him on or about the time of his injury, May 25th, 1885.

49 A. Yes, sir. Yes, sir; I was.

Sixth Interrogatory. State whether you knew of the nature of the injury of plaintiff; and, if so, how soon after it occurred?

A. Yes; I know the nature of it next day.

Seventh Interrogatory. State if you know what caused those injuries to plaintiff, and if you know the manner in which they were received.

A. Yes; the falling of coal. Plaintiff was repairing the track and loading coal when this coal fell from the side upon him.

Eighth Interrogatory. If you state that the injuries were received by plaintiff by the falling of portion of the roof and wall of said mine, state whether, prior to its fall, your attention had ever been called to that portion of the mine and to the portion of the roof whose fall occasioned the injury to plaintiff.

A. Yes; the plaintiff spoke to me several times about this particular entry being unsafe, and that he was afraid of getting hurt. I also heard him (plaintiff) call Mr. Thomas' attention to the same entry as being unsafe.

Ninth Interrogatory. If you state that your attention had been

called to the same, state what its appearance was when you last saw it prior to its fall, whether the same appeared to be secure and safe or unsafe.

A. It was hanging over and unsafe.

Tenth Interrogatory. State, if you know, who was the foreman or superintendent of the Grass Creek mine in charge of the same on the day last mentioned.

A. Tom Thomas.

Eleventh Interrogatory. State, if you know, whether the attention of any superintendent or foreman or person having charge of that part of the mine had been called to that portion of the roof prior to its fall; state whose attention was so called, and further state, if you know, how long prior such attention was called, and by whom, and what was said by both parties on that occasion.

A. Tom Thomas the superintendent's attention was so called. Mr. Reddon, the plaintiff in this case, called Mr. Thomas'
50 attention to the fact that this was unsafe. Mr. Thomas' reply was that if he, Mr. Reddon, was to take down that coal it would cause too much delay to the cars running out and in, and wound up by saying, "Hell! there's no danger anyway," or words to that effect.

Twelfth Interrogatory. State, if you know, how long before the accident referred to this portion of the roof had presented an unsafe or dangerous appearance.

A. As near as I can now recollect, I should say two or three days.

Thirteenth Interrogatory. Do you know Thomas Thomas? If so, state his position or occupation on the Grass Creek mine on or about May 25th, 1885.

A. I do. He was superintendent of the mine.

Fourteenth Interrogatory. State if you were at any time in company with plaintiff after the date of the accident, when a conversation was had between plaintiff and Thomas Thomas upon matters connected with the injury and the bringing of this suit.

A. I was.

Fifteenth Interrogatory. If you state that you were present at such conversation, state whether you were present on more than one such occasion. Give the date as nearly as you can and the place where it occurred.

A. Only once. It occurred back of Beckwith & Quinn's store, on the platform beside the railroad track. After bidding each other the time of day, or friendly greeting as it is called, the plaintiff, Mr. Reddon, says, "My God, Tom, I wish you had let me take that coal down when I asked you to; I wouldn't have been in the fix that I am now." Mr. Thomas replied, saying, "Yes, I had no idea it was so dangerous." The date when the foregoing conversation took place I have forgotten.

Sixteenth Interrogatory. State what, if anything, was said by Mr. Thomas as to what he would swear to in the event that suit was brought by Reddon, what; if anything, was said by Mr. Thomas as to whether he (Thomas) had noticed prior to its fall that the roof was in a dangerous condition.

A. Can't say, as I never heard Mr. Thomas express himself. Mr. John Williams, party who timbered up a portion of the
51 entry, repeatedly called Mr. Thomas' attention to the dangerous condition of the entry.

Seventeenth Interrogatory. State fully as you can the conversation on both sides, giving as nearly as you can the language of the parties.

A. Never heard any conversation regarding a lawsuit.

Eighteenth Interrogatory. If you know anything less to the advantage of plaintiff in this case, please state as fully as though you had been specially interrogated thereupon.

A. I was present at the examination of Mr. Reddon by the doctor the day after he was hurt, and heard the doctor say that his spine was materially injured.

Cross-Interrogatories to be Put to said John Lawrence, a Witness on Behalf of Plaintiff.

First. Were you present when the plaintiff was hurt? And, if yea, state who also was there present; give the names of each person.

A. I was not; am not sure, but believe Harry Thomas was present.

Second. What kind of work was plaintiff engaged in on that day, and what sort of work did he generally perform, if you know? State also, if you know, what he was doing at the particular time he was hurt.

A. On that day he was repairing track and loading coal. He generally laid and repaired track.

Third. If, in answer to direct interrogatory, you state you do know the nature of the plaintiff's injury received May 25th, 1885, state particularly and fully how you know and all your means of knowledge.

A. I was present when the doctor made the examination of Mr. Reddon, and heard them say his spine was materially injured.

Fourth. If you were not present when the plaintiff was hurt, where were you at that time? How far away from the place of the accident, and how long after it occurred was it that you were there?

A. I was on the sixth level. I was back in some of the chambers on the sixth level; can't say just how many feet or tell the exact distance. I was away from him when he got hurt. I don't remember how long it was.

52 Fifth. If, in answer to the eighth direct question, you say your attention had been called to that portion of the mine, then state also who it was that called your attention, how long before the accident it was, where, who all were present, and what was said; if it had been so called on more than one occasion, give time, place, who all were present, and what was said on each of those occasions.

A. Mr. Reddon called my attention two or three days, as near as

I can recollect; Thomas Thomas was present on one occasion: don't remember of any one else being present.

Sixth. Give a particular description of the place and surroundings in the mine where this accident took place, so that the points could be found be any one familiar with the mine.

A. This accident took place on the fifth level or entry, somewhere between rooms eighteen and twenty-one, but, from the heaving or swelling nature of the floor, I think at the present time it would be impossible for any one to find the exact place where the accident did occur unless the mine was reopened.

Seventh. If you say that the attention of the superintendent or the foreman had been called to that portion of the roof before it fell, state how you know it was; whether you were present and who else and why his attention was called to it. Please state all you know on that subject fully and completely, giving a full account of each occasion the attention of such person was called to the matter.

A. I presume the reason why the superintendent's attention was called to this particular spot or place being unsafe was that the parties who had to pass and repass it had examined it and found it so.

Eighth. If to fourteenth and fifteenth interrogatories put by plaintiff you state you had one or more conversations with Thomas upon the subject there alluded to, state the time, place, and who were present or in hearing on each occasion, and also state how these conversations were brought about and how you happened to be present.

A. The answers to these questions are the same as for the plaintiff heretofore answered. I just happened to be in Mr. Reddon's company at the time.

Ninth. What, if anything, did Thomas state he would swear to in case suit was brought by Reddon? State it all fully and in detail.

A. Never heard any talk about a suit between them.

53 Tenth. Have you or have you not had any interest in this suit; how did it happen that you had talked about it to so many different persons and at so many different times?

A. No, I positively have no interest in this suit. I don't think it any of your business about how much I have talked or who to. I consider this a free country, and freedom of speech is allowed to all.

Eleventh. How long were you employed at the Grass Creek mine and what different kinds of work did you do?

A. About three years; carpenter and assistant sulphur boss, and looking after the air courses.

Twelfth. Are you not a carpenter instead of a miner?

A. I never claimed to be a miner at the Grass Creek mine. I am a carpenter.

Thirteenth. When did you leave that mine and where did you go first from there, how long did you stay, what did you do, and where did you go next, &c.? Please give a full account of where

all you have been, how long you stayed, and what you did in each place, where you live now and what are you doing there.

A. I left there about the seventh of February, 1886. My post-office address now is Blakely, Custer Station, N. P. R. R., Yellowstone county, Montana Territory, and I am at the present time employed as a carpenter on the Unitarian mission, on the Crow Indian reservation, at what is known as the seven (7) mile point on the Big Horn river.

Dr. F. S. BASCOM, being sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination by Mr. BROWN:

Q. Doctor, where do you reside?
A. In Salt Lake City.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been engaged in that business?
A. About five years.
Q. What school are you a graduate of?
A. Rush Medical College of Chicago.
Q. How long, in Salt Lake, have you been engaged in the profession?
A. Oh, in Salt Lake, about three years.
54 Q. Two years in Salt Lake?
A. Three almost.
Q. Three years *years* in Salt Lake. Have you recently made an examination of the person of the plaintiff here, Mr. Reddon?
A. I have.
Q. When was it that you made the examination?
A. Last Saturday, I believe; Friday or Saturday, I have forgotten which day.
Q. How carefully did you examine him?
A. I examined him very carefully, I think.
Q. How long a time did it take you to examine him?
A. About an hour, I think.
Q. Test his injuries in any way?
A. Yes, sir; in various ways.
Q. How?
A. Simply by manipulation, and by watching the patient and putting him through the various movements which I would in an examination of that kind.
Q. With a view of determining what did you examine him?
A. The extent of his injuries, and what they really were.
Q. What did you find was the extent of his injuries?
A. I found that the injury was principally in the lumbar region and involves three of the vertebræ, as near as I could make out—that is, the third section of the spinal column, and also that it seemed to involve, from his symptoms, some of the larger nerves leading towards the lower extremities, or, in other words, the termination of the spinal cord.

Q. What is the effect of such an injury as to the suffering of the patient?

A. Well, the suffering must necessarily be very intense much of the time, especially on movement, because the parts injured are not only the nerves themselves, but the articular surface of the vertebræ forming the spinal column, and every time that he would move his back it would necessarily give more or less pain. I was going to say that I couldn't see how the patient could move, if the injury is as serious as I think it is, without giving considerable pain.

Q. What is the effect of such an injury as to permanency, as to whether he would be permanently disabled from labor or not?

A. In cases of these spinal injuries the permanency is—usually depends largely upon the persistency of the trouble; as I understand his case, it has continued for something over a year, and in
55 that case the prognosis would be much graver than if the injury was recent.

Q. You may assume in your answer that the injury occurred by the falling of a mass of coal upon the patient's back on the 25th day of May, 1885, and that he was taken up unconscious from that fall. You have seen the condition that he was in since?

A. Well, I believe it is usually conceded that any spinal injury lasting longer than six months is liable to remain permanent and grow worse rather than better. In this case, having happened almost a year and a half, or a year and a half, I see very little probability of his ever entirely recovering or, perhaps, ever growing any better than he is now, if not worse.

Q. Assuming him to be about thirty-six years of age at the time of the injury, and in good health; that he has lived a year and a half since, or since the 25th of May, what is the effect on his living long or living a long time?

A. I think it would tend to shorten his life very considerably.

Q. Tend to shorten his life; yet he may linger long?

A. Yes, sir.

Q. A number of years?

A. It is hard to tell; there is nothing definite about a case of that kind.

Q. Nothing definite about it?

A. No, sir.

Q. What is the rule as to whether patients do live a great number of years with injuries to the back?

A. They usually do not live a great many years—that is, if the injury is very severe; it depends largely upon the condition.

Q. Yet sometimes they live a great many years?

A. Yes, they do.

Q. That, I suppose, depends somewhat on the general health of the patient before the accident?

A. And the extent of the injury.

Q. You have seen the patient, as to his general health outside of this injury; state what would be your impression as to his living a good while—a strong man as he apparently was.

A. I could give no definite opinion in regard to that; his general health doesn't seem to be greatly injured, although some special organs seemed to be more or less involved—some irritability of the bladder; his eyesight, he says, isn't as good as it was; this condition we find frequently associated with these injuries of the spinal cord.

56 Q. The effect of the injury to the lower spinal cord injures the eyesight?

A. We find—yes, conditions involving the eyesight; then he cannot use his limbs at all, or without great difficulty.

Q. Have you had practic- here since you have been in this city, as a surgeon especially?

A. Yes, sir.

Q. In what place have you practiced?

A. You mean in what particular case, or what particular position I have held?

Q. What position have you held?

A. I am one of the local surgeons of the Denver & Rio Grande road, and also practiced in St. Mary's Hospital.

Cross-examination of Dr. F. S. Bascom.

By Mr. Williams:

Q. You say, Doctor, that the question of the party's recovery, after a year and a half time having elapsed and becoming in this condition, is not probable; do I understand you to say that?

A. Yes, sir; I feel that way, that it is not probable that he will recover.

Q. Recoveries after a lapse of time, however, in similar cases of injury are not infrequent, are they?

A. Yes, I think they are infrequent; I cannot say that there are no such recoveries, however.

Q. You say you find some injury or disturbance of the bladder?

A. A little irritation of the bladder.

Q. A little irritation?

A. Yes, sir; seems that he is obliged to——

Q. (Interrupting.) To what extent? Describe the condition which you find.

A. Nothing serious, only that it is an irritation in the terminal nerves to the bladder; that he is obliged to pass his water more frequently than he did before the injury.

Q. More frequently than is usual to a person in health?

A. Well, that I can't say, because—yes, more, usually, than a person in perfect health should. Frequently we have men in very good health who have slight irritations of the bladder, otherwise in perfect health.

Q. Is there any indication of injury to the kidneys?

A. I could find none.

57 Q. What say?

A. I could find none.

Q. Then you locate the injury in three of the vertebræ?

A. Lower lumbar vertebræ.

Q. The three lower of the lumbar vertebræ?

A. Yes.

Q. A nervous injury in that locality also?

A. Yes, sir.

Q. Of the nerves, you say, extending to the lower limbs?

A. Lower extremities.

Q. The question of effect upon abbreviating a person's life is scarce capable of estimation with any sort of certainty, is it?

A. Well, yes, sir; medical literature would teach us that there is very little hope of a patient living as long as they would without the injury.

Q. As long——

A. (Interrupting.) That it does greatly abbreviate life.

Q. But still there is no sufficient data in this case, or in similar cases, to form any definite opinion on in any individual case as to the length of life?

A. I think I could safely say in this case that it will shorten the man's life.

Q. How much?

A. Well, that I can't say.

Q. Can you give an opinion?

A. It depends entirely on how the injuries progress, of course. If he remain in this condition it would shorten—well, I had rather not give dates; I couldn't.

Q. Well, you think it might shorten it; it would be a little too risky to undertake to measure the length of time——

A. (Interrupting.) Yes, sir.

Q. —by which it would be shortened. So, after all, that is largely speculative, is it not?

A. Only, as I say, I base my opinion upon the usual history of those cases.

Q. Are you able to say that the irritation of the bladder was the result of this injury?

A. No, sir; I can only say that it seems to date from the injury.

Q. That is, from his——

A. (Interrupting.) Yes, sir.

Q. —description of the symptoms?

A. Yes, sir.

58 Redirect examination of Dr. F. S. Bascom.

By Mr. Brown:

Q. If you should find that the patient was relieved by holding onto something with his hands—holding something with his hands—what effect would that indicate as to the nerves in his lower limbs?

A. It would indicate usual injuries to the articular surfaces of the vertebræ.

Recross-examination of Dr. F. S. BASCOM.

By Mr. WILLIAMS:

Q. That would simply be by his hands, to relieve his backbone of a part of the weight?

A. Certainly; relieve the pressure by raising himself up in this way.

Mrs. MARGARET REDDON, being sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination by Mr. CRITCHLOW:

Q. Mrs. Reddon, you are the wife of the plaintiff in this action, William Reddon?

A. Yes, sir.

Q. You were living with him, were you, in May, 1885, at Coalville——

A. (Interrupting.) Yes, sir.

Q. Out at Grass Creek?

A. Yes, sir.

Q. Do you remember the date of his injury in the mine?

A. Yes, sir.

Q. The fact that he was injured?

A. Yes, sir.

Q. What did you first see of him that day after he went into the mine last and before his injury occurred?

A. I don't remember——

Q. (Interrupting.) When did you next see him after the occurrence of the injury?

A. Well, he hadn't been away from home didn't seem to me but a very short time, maybe about—didn't seem over half an hour to me; might have been a little longer; didn't seem as though he had been gone much longer than that.

Q. Well, in what condition was he when you first saw him, and where?

59 A. When he came back?

Q. Yes.

A. Well, he was in a very bad condition.

Q. Well, how; was he walking?

A. No, sir.

Q. Well, how was he brought?

A. Some gentlemen was packing him.

Q. Was he conscious or unconscious?

A. Well, I don't know; I think he was a little conscious.

Q. Well, was he conscious or unconscious—did he recognize you?

A. Yes.

Q. Did he seem to be in any pain?

A. Oh, yes; seemed to be in lots of pain.

Q. How did he manifest his pain—how did he seem to show that he was in pain?

A. Well, I don't remember just rightly how that was, now.
Q. Did he say anything?
A. He complained of his back, the first thing.
Q. He did what?
A. Complained of his back, the first thing I heard him say.
Q. What did he say in that regard, do you remember?
A. He said that he—let's see—I don't exactly know right to what he did say, every word.
Q. Well, as to his back; did he give any other demonstration of pain—did he cry or groan?
A. Oh, yes.
Q. Or take on in any way?
A. Yes, he did; he groaned terrible.
Q. And while they were bringing him home, do you mean?
A. After they got him into the house; I didn't see him until they brought him in the house.
Q. Well, how long did that continue?
A. Well, we—let me see—I can't tell exactly how long he was like that.
Q. How long was he confined to his bed, do you remember?
A. I don't remember that, neither, just to a day.
Q. Well, did you have the care of him during this time?
A. Well, I was there all the time.
Q. You were there?
A. Yes, sir.
Q. Was there anybody else there caring for him?
60 A. Yes, sir; we had—generally had five men sitting at nights, and had to turn him in sheets.
Q. He couldn't help himself, then?
A. No, sir.
Q. Well, during this time, while he was confined to his bed, did he manifest any pain in any way?
A. Oh, he was distracted in pain.
Q. Groaning?
A. All the time; especially if we went to move him at all.
Q. Well, you say you don't know about how long he was confined to his bed?
A. No; I don't know exactly.
Q. Well, when he first got up, or after he was able to get up, could he do it without assistance, or——
A. (Interrupting.) No, sir.
Q. —was he assisted every time?
A. He could not; my daughter and myself, we had to help him.
Q. How old is your daughter?
A. She is seventeen.
Q. Well, after that, has he ever been able to assist himself around the house?
A. A very little.
Q. Or get along without assistance?
A. No.
Q. Or does *it* need it from you folks?

A. We have had to assist him all the time.
Q. In what manner—in what particular?
A. Well, we have had to dress him and so on; he can't get around himself, for to do anything for himself.
Q. Put on his shoes?
A. No, sir; never has been able to put on his shoes.
Q. That continue- up to the present time, you say?
A. Yes, sir.
Q. Has he ever been able to do any work, and assist about the house in any way?
A. Nothing at all.
Q. Do any of the chores, or anything of that sort?
A. Never a chore.
Q. Requires to be waited on rather than assist?
A. Yes, sir.
Q. How large family have you, Mrs. Reddon?
A. I got six.

61 Mr. WILLIAMS: I don't see any relevancy to that.
WITNESS: I have got six children.

Mr. WILLIAMS: Wait. We object to that.
Mr. BROWN: We withdraw it. I believe that is all.
Mr. WILLIAMS: We have no questions to ask.

JOSEPH BLACK, being duly sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination by Mr. CRITCHLOW:

Q. Where do you reside?
A. Coalville.
Q. What is your business?
A. Coal-mining.
Q. How long have you been engaged in that?
A. About nine years.
Q. Were you engaged in coal-mining in May, 1885?
A. Yes, sir.
Q. Where?
A. Grass Creek.
Q. At the Grass Creek mine of the defendant company?
A. Yes.
Q. What part of the mine were you at work in in May?
A. On the seventh level.
Q. That was on the 25th of May you were at work down there, were you?
A. Yes.
Q. How did you get from the slope down to the seventh level, where you were at work?
A. Well, there was a manway down to the fifth level—well, there was a manway down to the sixth level.
Q. You mean other than the slope?
A. Other than the slope; that is the same as that; you come down

that way, the manway, and then to the fifth level, and from the fifth level to the slope and from the slope down to the seventh level.

Q. Do you remember where this manway came into the fifth level?

A. No; I don't exactly remember the number of the room.

Q. About how far from the slope was it?

A. It was about a thousand feet, I should judge.

62 Q. In which level was it—east or west?

A. It was in the west.

Q. In the west of the fifth level?

A. Yes, sir.

Q. Well, going through the level there, did you know what the condition of the level was with regard to the overhanging coal and the safety or danger of the level?

A. Well, it was—I would consider it dangerous.

Q. You were going through there constantly, were you, yourself?

A. Well, no; not very often. I didn't go through there very often; probably once a week.

Q. About once a week. For how long back had you been going through there?

A. Well——

Q. (Interrupting.) Between what dates?

A. Well, I couldn't exactly tell. I had been working quite a long time; there was a kind of a clay—when I was late getting to work in the morning I used to slip down there very often.

Q. Well, you were familiar with it, were you, from the first of January to the latter part of May, 1885?

A. Yes; I had gone through there a few times between that.

Q. You say you considered the level dangerous?

A. Yes, sir.

Q. From what cause?

A. Well, from the cause of the coal falling away from the pillar, and of course it was filled up.

Mr. THOMAS:

Q. And what?

A. The coal falling away from the pillar; the coal was filled up, and there was nothing left to support the rock.

Mr. CRITCHLOW:

Q. You mean by the coal filling up—you mean thrown into the cars and taken out?

A. Yes, sir.

Q. What occasioned this fall in the mine from those ribs?

A. Well, by a squeeze or gas that was busted off.

Q. What occasioned the squeeze?

A. Well, the gas, I suppose. The gas was working in the rooms, you know. When you take the coal out the floor would heave up and give the coal a sort of a squeeze down; of course it got room to break—break the rock; of course the weight came onto it and made it dangerous.

63 Q. How was this fifth level with reference to the other levels in the mine or otherwise?

A. Well, I don't think it was any dangerouser than any other level. It was about the same.

Q. It was all dangerous, then, was it?

A. Well, yes; it was all on a squeeze.

Q. And what is the general condition of coal in a mine where it is squeezing or crushing, about its liability to fall?

A. Well, it is liable to fall any time if it isn't prevented.

Q. How—how prevented?

A. Well, by putting up props or timbering it.

Q. As I understand you, the mine was squeezing, and that was occasioned in part by the gas in the coal?

A. Yes; I should——

Q. (Interrupting.) Or gaps. Which did you say?

A. The gas. The gas, you see, would come under the floor and heave the floor, and of course that would give the roof room for to squeeze the coal.

Q. Supposing the pillars had been left there as they were originally mined, would the squeeze still occur?

A. Yes; of course it would have occurred just the same.

Q. Were any of the pillars taken out down below or anywhere through the mine?

A. No, sir.

Q. Well, were they propped or anything of that sort?

A. No; not that I am aware of.

Q. When they were left there, then, originally, they were left in such a condition that the natural weight of the mine tended to create this squeeze?

A. Yes.

Q. If they had been left larger, what would have been the condition of the mine or crush?

A. I guess it would have been just the same.

Q. Even if the pillars had been left twice the size there?

A. Yes; there would have been a squeeze. If there never had been any coal taken out there never would have been any squeeze.

Q. What was Mr. Tom Thomas' position on the 25th of May and previous to that time?

A. He was supirintendent.

Q. As superintendent do you know whether he was in and out through the different entries of the mine?

A. Well, yes; he was out and in.

Q. How frequently, if you can say?

64 A. Well, he was down in ours sometimes two or three times a day. I don't know anything about the fifth level—how often he was there. Of course, I wasn't there to see.

Q. You had worded in other levels at the mine, I suppose?

A. Yes, sir.

Q. And when you had worked there about how often had he been in the habit of visiting you?

A. Well, he would come in three or four times a day on this level.

Q. He was the one that gave the orders for work to be done through the levels?

A. Yes, sir.

Cross-examination of JOSEPH BLACK.

By Mr. WILLIAMS:

Q. You say you have been a miner about nine years, Mr. Black?

A. Yes, sir.

Q. Where are you working now?

A. I am working in Grass Creek.

Q. How much of this nine years have you worked in that mine?

A. I have worked five years—well, four years.

Q. So about half of your mining life has been *has been* in that mine?

A. Yes, sir.

Q. You are pretty well acquainted with it, then. Have you ever worked on the fifth level?

A. Yes; I have worked on the fifth level; when it was starting away.

Q. At this time that this accident occurred I believe you say you were working on the seventh?

A. Yes, sir.

Q. Was this crush or squeeze going on all through the mine pretty much?

A. Yes, sir; all through the mine.

Q. You say you attribute that to gases coming up, bringing the floor up—the gas that comes out of the floor?

A. Yes; that is the only thing that I can account for it.

65 Redirect examination of JOSEPH BLACK:

By Mr. CRITCHLOW:

Q. What is the condition of this fifth level now—this west part of the fifth level?

A. I don't know. I haven't been in the fifth level for twelve months.

Q. The last time you were there what was its condition? Were they still running it or working it?

A. Yes, sir; they was running it when I left.

Q. They were working it then?

A. Yes.

Mr. CRITCHLOW: That is all.

Mr. WILLIAMS: That is all.

Mr. BROWN: Mr. Williams, something was said about this question here that I suggested was rebutting testimony—the conversation with Thomas Thomas. I didn't exactly understand your position as to that, as to whether we could treat that as rebutting, being in now. Having gone into it, I suppose we should exhaust it.

Mr. WILLIAMS: You couldn't very well select from the deposition. I didn't make any objection. I simply said there were some of the answers that I didn't think were responsive.

Mr. BROWN: We didn't examine this gentleman upon that subject because we supposed it was only rebutting; but, as it was put in here, I suggest that we better put it in now.

Mr. WILLIAMS: I will not object to it now. You will have the right to show it one time or another.

Mr. BROWN: Very well; we will show it in rebutting.

WILLIAM C. REDDON, being called for further direct examination, testified as follows:

By Mr. CRITCHLOW:

Q. Mr. Reddon, what is the effect upon the pain in your back by the use of your arms in lifting yourself up?

A. Why, when I put my arms like that (illustrating) it eases my back—takes the weight off.

Q. How long has that been so?

A. Sir?

Q. How long has that been so?

A. Why, it has been this way ever since I worked in the mine the last time.

Q. Have you found any trouble with your eyes?

66 A. Yes, sir.

Q. Since the date of the accident?

A. Yes, sir; my eyes ain't so strong.

Q. Are not so strong?

A. No, sir.

Q. Had you ever experienced any trouble with them before the date of the accident?

A. No, sir.

Recross-examination of WILLIAM REDDON.

By Mr. WILLIAMS:

Q. What is the character of injury to your eyes? Explain what you mean by that.

A. I can't sit to read. If I take hold of a book to try to study—read—my eyes will fill full of water. They ain't strong, like they was before.

Q. Did you ever try using glasses?

A. No, sir; I have never tried glasses.

Redirect examination.

By Mr. BROWN:

Q. Have you noticed any effect upon your bladder since the date of the injury?

A. Why, I can't hold my water, like I used to. I make an awful sight of water. That's all the difference I can see.

Q. Dates from about the time of the injury, does it?

A. Yes, sir; it hurts me ever since I have been hurt.

Recross-examination of WILLIAM REDDON.

By Mr. WILLIAMS:

Q. Had you ever at any time received any injury to your back or in that region before this accident?

A. Never in my back. I was hurt once in the back of the neck here a little.

Q. That is, high up?

A. Yes, sir.

Q. Where was that?

A. That was in Coalville. That is when I first started to the mine.

Q. When you first started to the mine?

A. Yes, sir.

Q. And that injury was on the back of your neck, you say?

67 A. Yes, sir.

Q. About how far? Put your hand.

A. Right in there (pointing). A chunk of coal catched me across there.

Q. Fell on you?

A. Yes, sir.

Q. How much were you hurt at that time—how seriously?

A. Well, I don't know. I can't recollect how long it was; it was so long ago; nothing seriously at all—so very seriously.

Q. Disabled you for a time?

A. Well, I wasn't able to work for a week or so.

Q. Week or so?

A. Yes, sir.

Q. Feel the effects of that injury after a week or so?

A. Sir?

Q. Did you feel the effects of that injury subsequent to that for some time?

A. Yes; I did for quite a little while.

Q. About how long?

A. Well, say about a month, I guess, as near as I can get at it. I wouldn't say exactly, but I think it was somewhere about that time when I got entirely well; never felt it from that day to this.

Plaintiff rests.

Thereupon court adjourned until to-morrow morning at ten o'clock.

TUESDAY A. M., *November 30th*, 1886.

Mr. WILLIAMS: If your honor please, I desire to interpose a motion for nonsuit (reads motion), as follows:

(Title.)

And now, at the close of the testimony on the part of the said plaintiff, the defendant moves the court for a judgment of nonsuit herein, for that the said plaintiff has failed to prove a sufficient case for the jury, and because the evidence introduced by him shows

that he was himself guilty of negligence which contributed to cause the injury complained of.

P. L. WILLIAMS,
Defendant's Attorney.

After argument by counsel.

The COURT: I am disposed to hold that the question as to
68 whether the defendant was guilty of negligence under the evidence is proper to be submitted to the jury.

Of course, when the evidence is all in, it will be submitted in the light of all the evidence; and also as to whether the plaintiff himself used due care should be submitted to the jury; whether in view of all the circumstances under which he was at work at the time, and of the statements made to him by Thomas, the superintendent, whether he was guilty of a want of reasonable care, it is a question for the jury, I think. It will be remembered from this evidence that it is not precisely like the case where an employee is using a piece of machinery which — sees and which the employer and everybody can see is defective, and from the use of it danger is imminent; nor would it be like the case where, for instance, if this particular piece of coal had been discovered by the plaintiff to be dangerous and liable to fall—that there was something about it that indicated that it might fall and the attention of the defendant had been called to it. I don't understand that the evidence shows that the plaintiff in this case discovered that this particular piece of coal that fell or the coal that was on the roof or on the walls near him was dangerous at that particular place; that there was any imminent danger from that coal falling at that particular place. I don't understand that. The greatest seems to have been farther in. But it will be for the jury to determine whether the defendant was guilty of negligence here in stopping the timbering; and then if the evidence, when it is all in, should make it appear that the superintendent used no tests, no care, to ascertain whether the coal was loose—because it seems that it was not the business of this plaintiff to take down coal from these pillars or ribs, as they are termed; that was not his business. His business was to lay the track and to clean out the entry when coal had fallen. The work of taking down the coal and of timbering and of testing, it would seem to me, ought to be more particularly under the direction of the superintendent than any one else. He has the man in charge, and his business is to give directions, and from the fact that he is a superintendent, he ought to be a prudent, competent, and careful man—more so probably than the ordinary employee who is at work by the day in there under him at some particular branch of the business. I am of the opinion that the jury ought to be permitted to take this case and to determine it under the instructions—the charge to the jury. I do not feel authorized to take it from the jury, at this stage of the case at least. I express no opinion as to the sufficiency of the evidence. I leave that to be determined in the light of all the evidence and of the instructions.

Mr. WILLIAMS: We take an exception.

69 *Defence.*

THOMAS THOMAS, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where were you working on the 25th of May of last year?
A. Grass Creek mine.
Q. Grass Creek coal mine?
A. Yes.
Q. In what position were you acting at that time?
A. Superintendent of the mine, inside and out.
Q. You are a coal-miner by trade, are you?
A. Yes, sir.
Q. How long have you been engaged in coal-mining?
A. Twenty-six years.
Q. State whether or not you employed the plaintiff, Mr. Reddon——
A. (Interrupting.) Yes, sir.
Q —about December, 1884.
A. Yes, sir; I employed him the first of December.
Q. I wish you would state to the jury how he was employed and for what service and what service he rendered——
A. (Interrupting.) Yes, sir.
Q. —between that and the time of his injury.
A. Mr. Reddon came to me and wanted work, and I spoke to him—he wanted a job digging coal. I says, "There is no use for any coal-diggers." "Well," he says, "give me something else." Says I, "I will give you a job at company work."
Q. Now explain what company work is.
A. Company work means—what we call a day hand, supposed to be any kind of work that is needed in the mine.
Q. And what is the general class of work that is needed by day hands?
A. Everything concerned in the mine—loading coal, laying track, timbering, all such work.
Q. State whether it includes, or did include at that time, any work in the entries—whether day work included any work in the entries?
A. Yes, sir; it did.
Q. Well, state what.
A. It included—what work?
70 Q. What kind of work in the entries did it include?
A. Laying track, shifting track, loading coal, such things as that.
Q. State whether or not it included any work along or upon the ribs in the entry?
A. It is necessary for them, when they was loading coal, if there was any coal dangerous along the entries it was their business to

pull it down—generally get their orders from me to pull those pieces of coal down, which I always gave to them.

Q. State whether or not there were any other than such day men or company men, as Mr. Reddon was, that did such class of work in the entries.

A. Oh, yes.

Q. Well, was there any other than day men—was it day men that did this work?

A. Day men do this work; yes, sir. I was mistaken in that other answer.

The COURT: Well, make your correction.

WITNESS: There was no other men for this work excepting day men; they was the men to do this work.

Mr. WILLIAMS:

Q. Men employed just as the plaintiff was—Mr. Reddon?

A. Yes, sir.

Q. Now I wish you to state whether or not it was the duty of such men when they went to clear up an entry to also observe as to the condition of the ribs, as to their safety?

A. It was the duty of all miners to see that their place is safe before they start, as a general thing.

Q. State whether or not that is the rule of coal-mining, and was in that mine, as to the miners in their rooms—to inspect themselves the walls and surroundings?

A. Yes; during all the time they are working in it, yes, sir.

Q. State to the jury the rule of ascertaining or testing whether or not there is danger from falling of coal.

A. The general rule—men working in coal mines, whenever they go to a place to start in a new place, they always go to such a place to work, and the first thing they do is to go around and sound the coal and see whether it is safe or not, and if not they secure it, and don't wait for no orders.

Q. State whether or not all experienced miners are familiar with this test.

A. Yes, sir.

71 Q. So then, as I understand you, the method of testing is something that is known to every miner of any experience?

A. Yes, sir.

Q. Does that with his pick and hammer, does he?

A. Yes, sir; generally with a pick and hammer. He tells by the sounding of the rib of coal. It sounds hollow, and the same with the roof.

Q. State what the condition of this entry was on the 25th and for some months prior to that with reference to recurring falls in the entry. State whether or not that was frequent.

A. Oh, it was frequent.

Q. It was frequent?

A. Yes, sir.

Q. Falling from where?

A. Off what did the coal fall?

Q. Yes.
A. Off the ribs.
Q. Off the ribs?
A. Yes, sir.
Q. That was the front of the column—pillar between the rooms?

Thereupon court adjourned until 2 o'clock p. m.

TUESDAY AFTERNOON, *November 30th*, 1886.

Direct examination of THOMAS THOMAS.

Resumed by Mr. WILLIAMS:

Q. Mr. Thomas, at the close I had just called your attention to the frequency of coal falling in this fifth entry, and you stated that it was subject to fall there and had been in the habit of falling. I wish you would state, if you remember, the circumstance of stopping timbering about January before this accident?

A. We stopped timbering because it was unnecessary to timber——

Q. (Interrupting.) About how far did that timber extend west from the slope at the time you stopped it?

A. About 950 feet.

Q. About 950 feet?

A. I think so.

Q. I wish you would explain to the jury the reason that induced you to stop that timbering.

72 A. For the reason that the timbering was stopped was because we didn't need to timber it any farther. Those timbers that they talked about was to hold the roof, but there was better roof from there—the place that the timbers was put. This timber was put to hold this roof, because it was a bad roof, and from there, where we stopped timbering, it wasn't necessary to put any more timbering.

Q. I wish you would state also what, if any, effect was produced upon the timbers by this crush.

A. Well, the timber wouldn't last but a very short time on account of the crush.

Q. How did that use the timber?

A. Break them right off. The timbers were set in this way (illustrating). It would break and get right in our way. We always had to take them out.

Q. You heard the statement of the plaintiff, Mr. Reddon, with reference to a conversation which he fixes at about a week before his accident in this entry——

A. (Interrupting.) I heard it.

Q. —where the accident occurred. I wish you would state to the jury whether or not you had such talk at that time or place or any place with reference to that matter.

A. I have no recollection of such a talk myself.

Q. I wish you would state whether or not Mr. Reddon ever made

any objection in any way to continuing work in that level or the mine anywhere in consequence of the falling of coal—the liability to fall of coal.

A. Mr. Reddon never objected to go any place I asked him in the mine.

Q. That is, to work?

A. Yes.

Q. State whether or not he ever told you or intimated to you that he was afraid to continue work in there.

A. I have no recollection of it.

Q. I wish you would state whether or not what is called a crush or squeeze in a coal mine is a condition with which coal-miners are familiar generally.

A. Generally, coal-miners is familiar with all such work as this.

Q. In your experience as a miner how many different mines have you been acquainted with in which this condition was found or existing?

A. About seven or eight in my time.

Q. I wish you would state whether or not, in the business
73 of coal-mining, it is usual to abandon a mine for the reason that there is a crush or squeeze in it.

A. Scarcely ever.

Q. And you may state to the jury what the effect of a crush or squeeze in a mine is, with reference to its tendency to loosen coal and cause it to fall.

A. The reason the squeeze gets onto those pillars—the reason is, the crush getting onto those pillars and will push it down—the crush goes right onto those pillars and squeeze the coal until it falls, and makes it so it is all the time dangerous.

Cross-examination of THOMAS THOMAS.

By Mr. BROWN:

Q. How long had you been superintendent prior to the 25th of May?

A. Since July, 1884.

Q. How long had you remained superintendent after the 25th of May?

A. Up until the 8th of July, 1885.

Q. In whose employ are you now?

A. The same company.

Q. In what capacity?

A. What capacity?

Q. Yes.

A. Assistant to my brother.

Q. You are an assistant?

A. A kind of an assistant.

Q. A kind of an assistant?

A. Yes.

Q. Your brother is now superintendent?

A. Yes, sir.

Q. Gomer Thomas?
A. Yes, sir.
Q. Was it Mr. Reddon's duty when at work upon this mine to obey orders?
A. Yes, sir.
Q. You gave him orders each day what to do that day?
A. Generally I did.
Q. He had no duty to go ahead and perform any particular act without order from you?
A. Oh, yes.
Q. What?

74 A. He always—if I wasn't around there was a man there that tended to the business and instructed him, and he often went himself, because he knew his work.

Q. Who was that man?
A. Mr. Moore.
Q. What Moore?
A. Daniel Moore.
Q. If neither you nor Daniel Moore gave him any instruction what duty he was to do, what duty did he have to perform?
A. The duty that he was working at.
Q. What was that?
A. Well, he was kind of track-layer.
Q. Kind of track-layer?
A. Well.
Q. In the absence of directions from yourself or Mr. Moore, did he have any other duty to perform than that of laying track?
A. Yes.
Q. What?
A. Loading coal; anything that was necessary for him to do.
Q. Was he to be the judge of what was necessary for him to do?
A. No, sir.
Q. Who was to judge when you and Moore gave him no orders?
A. Judge?

(Question read.)

A. Why, of course, a man would judge for himself when I wasn't there.
Q. Was there any time during his employment that he was left to go on and do whatever he was amind to?
A. There was no special time.
Q. Was there any general time?
A. No.
Q. Did he ever have it among his duties to take down the coal in the entries and see that the entries were safe?
A. Generally a man working in such work as that takes that for his job, and he is supposed to pull the ore down as he goes along.
Q. How long would it take one man like Mr. Reddon to fix one of these entries and pull the coal down?
A. That is a question I can't answer.
Q. Two years?

A. I don't know, I am sure.

Q. Don't know whether it would take him two years or not?

75 A. I can't say.

Q. How long did you ever leave him without directions what he was to do?

A. Left him all day, many a time.

Q. More than one day at a time?

A. Oh, no, not to my knowledge.

Q. Can you recall any one day that you left him without any orders?

A. I can't recollect any special day.

Q. During those days that you left him what did he do?

A. It would all depend on what he was working at.

Q. Would he be allowed to step into one of those entries and pull down the coal—take it down so as to stop the run—the trip?

A. If it was dangerous.

Q. When was a track-layer allowed to do any such thing as that in a mine?

A. Oh, often does that.

Q. For how long a period to stop the trip?

A. Sometimes stop for an hour and sometimes two.

Q. To take down the coal along that entry from where you ceased timbering to Locke's room would take how long a time?

A. Can't begin to tell you, sir, at all.

Q. Can you tell me without months?

A. No, sir; I couldn't tell you.

Q. Would you expect a track-layer like Mr. Reddon, seeing that that entry was dangerous, to go to work to take down the coal over that entry?

A. A man in the employment of the company in mines is supposed to do anything he is told.

Q. Precisely; and when he isn't told to do anything is he supposed to take charge of the mine and run it for awhile?

A. No, sir.

Q. Not usually, is he?

A. No.

Q. And you wouldn't expect, in the absence of orders to Mr. Reddon, that he would take charge of that entry and fix it up in shape?

A. I would expect if he saw a dangerous piece of coal for him to pull it down.

Q. That is, if it was just one piece?

A. Yes, sir.

Q. Or a small place?

A. Yes, sir; any place. It makes no difference where.

76 Q. If it took the whole entry-way down you would expect him to go on and take it down, eh?

A. Anything that was dangerous.

Q. Now, do you really mean to tell this jury, Mr. Thomas, that you expect a mere track-layer, who worked under orders from you, if he found the whole of an entry dangerous that you expect him to go on and take down that entry without orders?

A. The whole entry I wouldn't say, but such pieces of coal——
Q. As wouldn't delay the train. Isn't that about it?
A. It doesn't make any difference about the train.
Q. It was his business to obey your orders, was it not?
A. Yes, sir; in case I gave orders or Mr. Moore.
Q. Yours or Mr. Moore's?
A. Yes, sir.
Q. How often were you through this fifth entry?
A. Me?
Q. Yes; you.
A. Sometimes three or four times a day, and other days maybe once.
Q. How long prior to the time Mr. Reddon was hurt had you been through that entry?
A. The same time. I went into the entry that same afternoon.
Q. Was you there the day before?
A. Yes, sir.
Q. And through that entry every day, almost, had you not been, for months?
A. Away from it?
Q. Through it. Hadn't you passed through it almost every day for months prior?
A. Oh, yes; yes, sir.
Q. And you knew the condition it was in, did you not, Mr. Thomas?
A. Yes, sir.
Q. How frequently was the coal falling in that entry?
A. Right along, sir.
Q. Every day?
A. Every day.
Q. The entry was dangerous at that time, wasn't it?
A. No more dangerous at that time than some other time.
Q. Yes; I agree with you on that proposition, but it was dangerous at that time, wasn't it?
A. No more than usual.
Q. Well, it was usually dangerous, then?
77 A. How?
Q. Usually dangerous, was it?
A. No more dangerous in that part of the mine than any other part.
Q. Well, the whole mine, then, is dangerous. Is that it?
A. To a certain extent.
Q. Now, Mr. Thomas, I want you to answer my first question without arguing it with anything else. I want to know from you directly if the fifth entry on or before the 25th of May wasn't dangerous; answer it yes or no.
A. We was working at these dangerous places.
Q. Can't you answer that question yes or no; was it dangerous or not?
A. I did answer I thought.

Q. Very well; if that is all the answer you can give I will pass it. You can't say that it was a safe place, can you?

A. It is as safe as any other part of the mine.

Q. You frequently talked about this case, haven't you?

A. About the case?

Q. This Reddon case.

A. Not unless somebody else spoke to me about the case.

Q. Do you remember talking with George Edgington about it?

A. Once, in Coalville.

Q. When was that?

A. I can't tell you the dates.

Q. Do you remember the occasion?

A. No.

Q. Was it shortly after the slack contract had been let to George?

A. Before that.

Q. Did you have a conversation with him about this injury, with reference to the slack contract?

A. No, not me, as I know of.

Q. You knew, did you not, that Reddon tried to get that contract after his injury?

A. My brother told me so.

Q. Well, you had heard of it?

A. Yes.

Q. Now, in connection with that, didn't you tell Mr. Edgington that the company had better let Reddon have that contract, because he had a dead open and shut on the company, and that that place was dangerous, and he would recover sure, and they would have saved a lawsuit by letting him have the contract?

78 A. No, sir.

Q. Or words to that effect?

A. No, sir.

Q. Never had any such conversation as that?

A. No, sir.

Q. Edgington himself took the contract, did he?

A. Yes, sir.

Q. Now, after he got that contract, didn't he come to you and tell you he had it, and didn't you make him that reply?

A. No, sir.

Q. Or that in substance?

A. No, sir.

Q. In Coalville?

A. No, sir.

Q. And in that same conversation didn't you say that the mine was dangerous, and Reddon had notified you that it was dangerous—notified you that it was dangerous?

A. Probably he did; he often done that, but I don't remember anything about it.

Q. You mean that Reddon had often notified you that it was dangerous?

A. Whenever anything takes place there is always one of the miners will tell the boss, of course.

Q. What is the condition of that fifth level now?
A. I can't tell you now.
Q. Why not?
A. Because I haven't been in it for some time.
Q. When was you in it last?
A. I guess five or six months ago.
Q. All fallen since, hasn't it?
A. No, sir; it hasn't fallen in.
Q. Why don't you go in it any more?
A. Because the bottom is heaved up again the roof.
Q. The bottom and the roof have come together?
A. Yes, sir.
Q. That is the reason you haven't been in it?
A. Yes, sir; it is abandoned for some time.
Q. You say you timbered about 900 feet—900 and odd feet?
A. Yes, sir; more or less.
Q. Before timbering, did you take the coal out of the roof or leave coal in the roof?
A. Take the coal—we take the coal out of the whole vein, from the floor to the roof.
79 Q. Then the timbers would simply hold the surrounding rock?
A. We timber if the rock is loose, of course.
Q. And timber after taking out the coal?
A. Yes, sir.
Q. You timbered as far as you took the coal out clear, did you?
A. We only has one row of timbers along the gangway.
Q. No lagging; didn't you have lagging over the roof?
A. Not over the roof.
Q. Lagging on the sides?
A. Yes, sir; some places.
Q. As you went farther in from the timbers, was the coal still left in the roof?
A. I don't understand that; I can't answer that question.
Q. Had you taken out all of the vein, clear to the country rock, beyond the timbers?
A. Yes, sir; clear through.
Q. Taken the whole vein?
A. Yes, sir; all the way through.
Q. So that there was no coal in the roof?
A. No coal in the roof.
Q. But the sides, the ribs, were left in coal?
A. Yes, sir.
Q. What is the effect of timbering on the sides?
A. Well, the effect of timbering in such a mine as that, the timbers wouldn't last but a few days.
Q. Is there any part of the mine where you have tried lagging?
A. Yes, sir.
Q. What part of the mine have you tried lagging on the sides?
A. The same entry—the fifth east.

Q. Fifth east; how are the slopes timbered—the main slope?

A. The main slope isn't timbered only at the mouth of the slope.

Q. Got square sets along clear through it, haven't you?

A. No, sir.

Q. No timber at all in the main slope?

A. Yes, in the top of it.

Q. How are those timbers in the top of it supported?

A. By square sets—that is, in the mouth of the slope.

Q. Well, beyond the mouth of the slope, as you go clear down the slope, what have you got in the roof of the slope?

80 A. Nothing.

Q. Just country rock?

A. That is all.

Q. What kind of country rock is it overhead, hanging wall?

A. Sand rock.

Q. Keeps in place there, does it, without falling?

A. Generally.

Q. Are you still using the fifth level on the east?

A. That mine is abandoned.

Q. The whole mine?

A. Yes; there is an opening in another place to go into the same mine, of course.

Q. But the whole slope and the whole thing is abandoned?

A. The old slope is abandoned.

Q. When was it abandoned?

A. Last month.

Q. Was it because it got so bad and dangerous?

A. No, sir.

Q. Did you, after timbering this 950 feet of the west fifth entry, ever timber any more of that entry?

A. We nevered timbered any; we changed timber there many a time.

Q. Did you timber Locke's room, or Locke's rib, or whatever it was?

A. I don't think we did.

Q. Or timber in any farther than this 950 feet?

A. No, sir.

Redirect examination of THOMAS THOMAS.

By Mr. WILLIAMS:

Q. About how many men did you set to work in the fifth entry on the day that this accident occurred, and for what purpose?

A. I set somewheres about fifteen men in the fifth entry that afternoon to load coal.

Q. State the particular necessity of putting so large a force in there at that time.

A. Because our track was heaved up there, and we couldn't get through any more, so we had to remove this coal and shift the track up the hill.

Q. How recently before that time had you been using the track in the usual way?

A. That afternoon.

Q. And do I understand you to say that the heaving had
81 gone on so rapidly that your cars wouldn't pass along there where the track was without changing; is that the fact?

A. Yes; the track heaved. Of course, it didn't heave all at once. It got so bad that we couldn't get through it.

HARRY THOMAS, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. You are a coal-miner, are you, Mr. Thomas?

A. Yes, sir.

Q. How old are you?

A. Twenty years old.

Q. How long have you been working in coal mines?

A. About eight years.

Q. Since you were a boy twelve years old, eh?

A. Yes, sir.

Q. You was with Mr. Reddon on the day that he got hurt, help-him, were you?

A. Yes, sir.

Q. You remember going to work at that place?

A. Yes, sir.

Q. How long had you been to work before the accident occurred?

A. I should judge about fifteen minutes.

Q. A short time?

A. Yes, sir.

Q. Had you filled a car yet?

A. No, sir.

Q. What was the general character of your business at that time?

A. Track-laying.

Q. Assisting whom?

A. Mr. Reddon.

Q. Did you assist from time to time in filling up the coal in the entry?

A. Yes, sir.

Q. I wish you would state what Mr. Reddon did with reference to the rib right where you were working at that time, if anything, about the time you began.

A. Well, to my best recollection, he pulled a little coal down off the rib before he started to load.

82 Q. Is your remembrance distinct, you think, as to his having pulled down——

A. (Interrupting). Yes; I think he did.

Q. —a little coal?

A. Yes, sir.

Q. How near was that to the place where the other afterward fell that hurt him?

A. At the same place.

Q. What say?

A. The same place.

Q. Are you acquainted with what the miners call a squeeze or crush in the mine?

A. A little.

Q. State whether or not you knew or understood previous to that that the mine was undergoing a crush or squeeze.

A. Yes, sir; it was.

Q. Was that generally known amongst the miners?

A. Yes, sir.

Q. About how long was it after Mr. Reddon pulled down this piece of coal that you remember seeing him pull that the fall came which hurt him?

A. Very shortly after.

Q. Very shortly after? What were you doing just at the time?

A. I was filling coal in the same car.

Q. Same car? Where were you standing with reference to the rib and the car?

A. I was standing at the end of the car.

Q. On the track, then, you would be, would you?

A. Yes, sir.

Cross-examination of HARRY THOMAS.

By Mr. BROWN:

Q. How are you related to Mr. Thomas Thomas?

A. He is my stepfather.

Q. How long had you been to work in the mine at this time?

A. How long?

Q. Yes.

A. Had I been working in that mine?

Q. Yes.

A. About eight years.

Q. How old are you?

A. Twenty years old.

83 Q. What was the reason Reddon pulled down this piece of coal that you mentioned?

A. I don't know.

Q. Did you see him do it?

A. Yes, sir.

Q. Was the coal loose?

A. Well, I don't know whether it was loose then or not.

Q. What were your orders?

A. To load coal.

Q. Not to pull any down?

A. No; didn't give us orders to pull any down at that time.

Q. But Reddon was pulling the coal down instead of loading it?

A. Well, he pulled a little down.

Q. How much do you mean by "little"?
A. Well, I knew he pulled about fifty pounds down.
Q. Fifty pounds? What did he do it with—a pick?
A. Yes, sir.
Q. Did you think pulling that down rendered the place more dangerous?
A. I don't know.
Q. Didn't you have any opinion at the time?
A. No, sir.
Q. No opinion? Did you continue to stay there and load after he pulled this coal down?
A. Well, I did; yes.
Q. Make any remonstrance with him about pulling down fifty pounds of coal?
A. No, sir.
Q. What?
A. No, sir.
Q. Said nothing about it? Was you there when Mr. Reddon was hurt?
A. Yes, sir.
Q. How much coal fell on him?
A. About a ton.
Q. Did you help get him out—did you?
A. Yes, sir.
Q. Have you been in the employ of the company ever since?
A. Yes, sir.
Q. When did you first tell this, about his pulling down fifty pounds?
A. Just now.
84 Q. Never told it before?
A. Not as I know of.
Q. Never mentioned it to Mr. Williams, the attorney?
A. Yes, sir.
Q. What did you mean by saying not as you know of? Why did you make that answer if you knew that you had told him?
A. Well, I thought you meant talking on the outside of it before; I didn't know what you meant by——
Q. (Interrupting.) When did you tell Mr. Williams about it?
A. The last time I was here—last Monday, I think it was.
Q. Last Monday you told Williams about it?
A. Yes, sir.
Q. Had you ever mentioned it to your stepfather?
A. No, sir.
Q. Never mentioned it to anybody?
A. No.
Q. How did you happen to tell Williams about it?
A. Well, he asked me.
Q. He asked you if Reddon pulled down fifty pounds of coal, did he?
A. Yes, sir.

Q. And then, without your having told anybody, he asked you that question, and you said yes. Was that the reply?

A. He asked me; yes, sir; and I answered him.

Q. Didn't you ever tell anybody else besides Williams?

A. No, sir.

Q. Nobody else?

A. Not as I know of.

Q. How on earth do you suppose Williams came to know about it and ask you about it?

A. Well, he asked me all the particulars of the work when I was working with Mr. Reddon, and I told him.

Q. He didn't ask you, then, if Reddon pulled down some coal?

A. Yes, sir; he did.

Q. He did ask you that question?

A. Yes.

Q. However, you had never told anybody?

A. Not before——

Q. (Interrupting.) Was there anybody else present at the time Reddon was hurt besides you and Reddon?

A. Oh, yes.

85 Q. Who else was present?

A. There was some Chinamen there.

Q. Anybody else besides you and the Chinamen?

A. Yes, sir.

Q. Who else?

A. Mr. Williams was present.

Q. Thomas Williams?

A. No, sir; William Williams.

Q. William Williams was present—you and William Williams were there?

A. He was right close by.

Q. Now, you remember distinctly that he pulled down the coal first, don't you?

A. Yes.

Q. Then why, if you remember that distinctly—why did you begin your statement by stating that you thought your best recollection was that he pulled the coal down?

A. Well, because it came to my mind that I had seen him pull down some coal.

Q. You didn't have any doubt about it, did you?

A. Well, no.

Q. Not a particle of doubt? *What* did you qualify your statement, then, with that clause, you thought it was so?

A. It is kind of a way of mine of talking, I guess.

Q. Did you tell Van Cott about this?

A. No; I don't know as I did.

Q. Don't know as you did? Do you know that you did not?

A. No; don't think I did.

Q. He saw you up to the mine, didn't he?

A. Yes, sir.

Q. When was it?

A. About three weeks ago, I think.

Q. About three weeks ago? Van Cott was up there and saw you and he talked with you about your testimony?

A. Yes, sir.

Q. Asked you what you knew about it, did he?

A. Yes, sir.

Q. Asked you to describe what happened at the time Reddon was injured?

A. Yes; some.

Q. Did you describe what happened at that time?

A. Well, yes; a good deal.

86 Q. Did you tell him at that time that Reddon had pulled down some coal before he was injured?

A. I don't know whether I did or not.

Q. Don't know? Can't you remember so far back as three weeks ago?

A. No, sir.

Q. Can't remember so far?

A. Not at that time.

Q. How long ago was it that Reddon was hurt?

A. About a year and a half, I think.

Q. You never mentioned it to any one until you told that to Williams?

A. Yes.

Q. And yet you remember that particular fact?

A. Yes.

Q. Can't remember whether you told Van Cott that three weeks ago or not?

A. No; I don't know whether I did or not.

Q. Did you talk with Mr. Critchlow about it about the same time?

A. Well, I didn't talk much with Mr. Critchlow.

Q. Well, did you talk at all with Mr. Critchlow?

A. Yes; some.

Q. Did he ask you what happened at the time Reddon was hurt?

A. I believe he did.

Q. Did you tell him?

A. I told him some.

Q. Why didn't you tell him all?

A. I guess I didn't have to.

Q. Didn't have to?

A. No.

Q. You was trying to keep some back from Critchlow, was you?

A. No; I don't know as I was. He didn't inquire much.

Q. Didn't inquire much?

A. No, sir.

Q. Didn't he ask you what happened—to go on and tell it in your own way?

A. I told him some.

Q. Well, he asked you that question, didn't he?

A. Yes; I believe he did.

Q. Why didn't you tell him all that happened?

87 A. Well, I told you why.

Q. Because you didn't have to? That was your only reason, was it?

A. Yes, sir.

Q. You knew he was attorney for Reddon, did you?

A. Yes; I believe I did.

Q. He told you so, didn't he, and you kept it back because you didn't want the attorney for Reddon to know all the facts, did you?

A. Well, I answered all he asked me.

Q. Did you answer all he asked you?

A. I believe I did.

Q. Well, you say he asked you to tell what happened at the time Reddon was hurt?

A. What's that?

Q. He asked you to tell what happened at the time Reddon was hurt, didn't he?

A. Yes.

Q. And you didn't tell him this about the coal falling on him?

A. Don't know whether I did or not. I don't think I did.

Q. Or about his pulling the coal down; that you didn't tell him?

A. I don't know as I did.

Q. Now, I want to know if you had any particular reason in concealing that fact.

A. No.

Q. Isn't it a fact that you never thought of it until after Critchlow was there? Isn't that the reason you didn't tell Critchlow and Van Cott about it?

A. No; I don't think I did.

Q. You had it in your mind all the time? You was thinking of it at the time Critchlow was talking to you?

A. No; I don't think I did.

Q. You didn't think of it at the time, then?

A. No, sir.

Q. Didn't think of it—hadn't thought of it at all, had you, until after Van Cott and Critchlow were there?

A. No; I don't know as I did.

Q. You don't know as you did? That is something you have made up since, isn't it?

A. No; I don't think—well, yes; it has come to my mind since.

88 Q. Oh, come to your mind since. Well, that's all.

Redirect examination of HARRY THOMAS.

By Mr. WILLIAMS:

Q. This talk that you had with me was up at my office, when you came down here a week ago yesterday, was it?

A. Yes, sir.

Q. And expected the case would come on then?

A. Yes, sir.

Q. As to what Reddon did——
A. (Interrupting.) Yes, sir.
Q. --all the particulars of it, did I not?
A. Yes, sir.
Q. And it was then, as far as you remember, that you first told about his having pulled down some coal?
A. Yes, sir.
Q. And it was under those circumstances of a good many questions put to you, was it not?
A. Yes, sir.

THOMAS JAMES, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. What is your business, Mr. James?
A. Is a miner.
Q. Coal-miner?
A. Coal-miner.
Q. How long have you been engaged in coal-mining as your general business?
A. I was taken in the mine when I was nine years of age with my father.
Q. How old are you now?
A. I will be forty next February.
Q. Has that been your usual business in life, then, coal-mining?
A. Yes, sir; except since this late war.
Q. You were a soldier awhile, eh?
A. Soldier awhile in the war.
Q. In what different countries have you coal-mined?
A. In the United States.
Q. What different States?
89 A. Pennsylvania, Ohio, Indiana, Kansas.
Q. And in this Territory you have mined, have you—in this Territory?
A. And some in this. Four years here, as near as I can recollect.
Q. Have you mined any in Wyoming?
A. No.
Q. Are you acquainted with the Grass Creek mine?
A. I have four years' experience in it.
Q. Been working in there four years?
A. Four years.
Q. Are you employed there now?
A. Yes, sir; all the time.
Q. What different kinds of work have you been engaged in in the Grass Creek mine?
A. At what we call day work and mining.
Q. How is the mining done with reference to the payment of the miner?
A. By the yard.
Q. His wages depend upon the amount of coal he digs?

A. The yards that he gets out.

Q. How long did you work as a day man—by the day?

A. I couldn't remember.

Q. Are you working that way now?

A. No; I am working piece work now.

Q. Piece work?

A. Yes, sir.

Q. Are you acquainted with the usual duties of day or company men in that mine?

A. Partly so.

Q. I wish you would describe the different kinds of work that they have to do usually.

A. What, day work?

Q. Yes; the day or company men.

A. Have to do all that they are required to do. There is a great many different kinds of work.

Q. What is the general class of work that they are required to do?

A. Well, around the track, and timbering, and other such work that there is need for.

Q. Men are required in the mine there from time to time, are they not, in the entries in taking up loose coal?

A. Yes.

90 Q. Are any men required in the mine at any times to pull down coal that is showing indications of falling from the ribs, etc.?

A. I have known our bosses to send and pull it down.

Q. Well, now, what kind of men, as they are known in the mine, does that class of work in that mine?

A. Well, if he thinks a man is responsible he will send——

Q. (Interrupting.) Well, as to their employment. Does that belong to the piece workers or the day workers?

A. It don't belong to the piece workers.

Q. Well, does it belong to the day workers?

A. I couldn't say exactly. It must be them.

Q. All men are employed either by the piece or as day workers, are they?

A. Yes.

Q. I wish you would state whether or not you ever did any work along the entries in clearing up coal or pulling out loose coal when you was a day worker.

A. Oh, I did a great deal of it.

Q. You did a good deal of it?

A. Yes, sir.

Q. I wish you would state whether or not, when as a day worker you were engaged in working in the entry, it was usual or a part of your work to pull down coal from the ribs if you saw that it was dangerous.

A. Well, I wouldn't wait to be told; I would naturally pull it down myself.

Q. Then it was part of your work to do that if you found it needed it. Is that the fact?

A. I used to take the responsibility on my own self to take it down.

Q. And that was, then, a part of your work, as I understand, where you found it was needed?

A. I supposed so.

Q. Was that the usual rule with day workers?

A. I couldn't say for others, but I used to do it myself.

Q. Did you know of some others doing it that worked with you?

A. I saw lots of men doing it.

Q. What, say?

A. I have saw lots of men doing it.

Q. And what kind of workers was it that you saw doing that?

A. Well, what we would call miners—day men.

91 Q. Day workers?

A. Yes, sir.

Q. Are you familiar with what is called a crush or squeeze in coal mines?

A. I ought to.

Q. Well, are you?

A. Yes, sir.

Q. You would oblige me by listening to my question and answering the question that I put to you; that is what we want to get at. I wish you to state to the jury whether or not that is a condition that is well known to coal-miners.

A. Of what, the squeeze?

Q. Yes, sir. If that condition is generally known to experienced coal-miners?

A. Oh, yes. I should say so.

Q. You have worked in other mines than this where that condition existed, have you?

A. Oh, yes.

Q. In how many, in your experience, if you can remember?

A. Well, the biggest part of them was in Pennsylvania; in the hard-coal regions.

Q. Well, about how many mines that were subject to this condition called squeeze or crush—about how many have you wrought in in your time?

A. Well, I couldn't tell you how many.

Q. Well, about how many? I want to see how familiar you are with them.

A. There is most a squeeze on every mine if the coal is taken out.

Q. That is very true; but mines you were working in, where it was perceptible?

A. Well, I should say there was a squeeze on every mine.

Q. That is all very well; but all mines don't bulge or break down the pillars, do they?

A. There is naturally a squeeze from the roof.

Q. There is weight there?

A. Yes.

Q. But so that it is affecting or causing coal to fall or the floor to heave, so that you can see it readily, how many different mines

have you worked in where those conditions are discernable readily—about how many, as near as you can remember?

A. Well, I can put it to a couple of dozen, sure.

Q. That is, you have known a couple of dozen?

92 A. Yes, sir.

Q. This mine in Grass creek, in May, 1885, and for some time prior to that, was undergoing a squeeze, was it not?

A. That is what we call it, a squeeze.

Q. And what was the effect of that upon the pillars with reference to the fall of coal?

A. It would squeeze the pillars and it would upheave the floor.

Q. And what was the effect upon it with reference to scaling off or causing coal to fall, did it have that effect?

A. Yes; coal would fall off and loosen the coal.

Q. It would loosen the coal?

A. Yes.

Q. I wish you would state, if you know, whether or not coal was frequently falling in the mine, especially on the fifth entry, from this cause.

A. Oh, yes; it was an occurrence that would happen every few days, to my memory.

Q. What kind of work were you engaged in in May, 1885, in the mine?

A. I was mining.

Q. You were mining at that time. So you wasn't a day worker at that time?

A. Not a day worker at that time.

Q. Have you worked any at day work since?

A. I have some.

Q. Have some since?

A. Yes, sir.

Q. Any mine where the condition of squeeze is existing? I wish you would state whether or not it has a tendency to loosen bodies of coal in a short time after they have apparently been solid or not.

A. Well, it is more so where there is gases than where there ain't. The more gas exists—where we have known it to be solid when we go to dinner or supper, as we would call it, we have known it to be loose and some of it down at one o'clock when we get back.

Q. Exactly. When you would be gone perhaps an hour?

A. Yes; when we would go to supper at night or dinner in the day.

Q. Is there any method known to miners generally by which they test the danger or liability of the coal to fall from the walls about them?

A. We would call it "try it."

93 Q. Well, now, will you explain to the jury how you try it?

A. We would take a pick and sound it and if it sounded something like a drum, why we would say it was ready to come down.

Q. You sound that by tapping on the coal itself, do you?

A. With a pick.

Q. With a pick?
A. Generally so.
Q. Usually use a pick?
A. Yes.
Q. Is the general method of trying resorted to by coal-miners generally?
A. I don't know of any other way but that.
Q. Now, will you be so kind as to answer the question that I asked you. Is that the way that miners usually try the coal to determine the fact?
A. How do you say?
Q. Is that the way that miners usually try to determine that fact—try the coal to determine whether or not it is going to fall; is that the usual way?
A. That is the way we always do it.
Q. Is that the general rule in all different mining countries where you are familiar?
A. It is the rule throughout the States so far as I have been.
Q. Where miners are working—where their work requires them in their room or elsewhere, I wish you would state what the rule of mining is with reference to making those tests themselves in the locality where they are working. Is that the rule, that they look out for it themselves or that they have somebody to come along and test it for them?
A. It is the rule every morning for a miner to test his own place.
Q. Test his own place?
A. Yes.
Q. How is it after he has made a shot in his room with reference to testing?
A. After you have fired, do you mean?
Q. Yes, sir.
A. Well, we would test it around from where the shot was put off.
Q. When you was working day work in entries did you ever test any of these ribs along where you was working?
A. If I was going to work somewhere thereabouts I would.
94 Q. You would the same as in a room?
A. Just the same as though I was working in a room.
Q. The reason for doing so in such a case would be just the same as though you were digging coal in a room, would they not?
A. My reasons for it would be that I wouldn't want to get hurt, that's all.
Q. And I say the reasons for doing so, if you was working in an entry, would be the same reasons that would induce you to if you were working in a room, would they not?
A. Just the same.

Cross-examination of THOMAS JAMES.

By Mr. BROWN:

Q. When you speak of every morning testing the place you go to work in—that is, when you are working in a room—some place where you go to work a good while?

A. That is what we call a room, where we work piece work.

Q. When you went to your room you test it every morning?

A. Yes.

Q. When you were laying track you wouldn't test the entry where you were laying track, would you?

A. I don't remember of laying much track.

Q. Don't remember of laying much track?

A. I might have worked along moving the track a little.

Q. In passing through the entry to and from your work you didn't go along and test the entry, would you?

A. No; not much.

Q. Every time you shoveled any loose coal that was in the track would you test the wall around you?

A. It would depend altogether if I was working on the road.

Q. If your duty was simply to shovel up the loose coal, not to take down coal at all, not to work on the wall or roof, but simply shovel up something, would you test the wall and entry first?

A. I would if the pillars were close.

Q. But if there was nothing to call your attention particularly to it you wouldn't expect to stop and test it?

A. No; I don't think I would.

Q. That would take a good deal of time, would it not, to stop to test every time that you were shoveling along loose coal?

A. I would try the roof.

Q. You would try the roof?

A. The roof; yes.

95 Q. But suppose the roof had been dug out until it was rock—no coal in the roof?

A. No.

Q. But on the sides—you wouldn't try the sides?

(No response.)

Q. Would you test these places where you worked—did you, as a rule?

A. In the rooms?

Q. Yes.

A. Test as often as we would think that there would be need for it.

Q. But you usually didn't test more than once a day, did you?

A. I couldn't say; well, I think I would after dinner.

Q. When you were working by the day you went to the parts of the mine and did the work that you was set to, I suppose?

A. Where I was sent to work that is where I would go.

Q. And the pulling down coal—you only pulled down as a day worker when you were told to?

A. If I saw there was any danger I wouldn't wait to be told. I would pull it down myself.

Q. But as a day worker, usually your business was to load up coal or to fix track or to pull down coal or do other things, as ordered?

A. I didn't fix no track.

Q. Didn't fix any track, but to load up coal or pull it down, as you were ordered?

A. Just as I was told.

Q. In other words, a day worker is one who works under the immediate orders?

A. Yes, sir.

Q. And a miner is one who works by the job, and his own boss to a certain extent?

A. Yes, sir.

Redirect examination of THOMAS JAMES.

By Mr. WILLIAMS:

Q. I was going to ask you, Mr. James—you mentioned that if you were working in the entry and the rib was close you would test it if you saw any indications of danger; do you mean if it was near to you?

A. Yes.

Q. Close to you?

96 A. Yes; if it was close I would try it before I would do any work.

Q. You mean by that if it was close enough so that if a fall came you would be in the way. Some of those ribs have——

A. (Interrupting.) Some are closer to the track than others.

Q. In a mine, whether it was in a room or in an entry where you were required to work, and coal was standing around that was falling frequently, and you knew that, caused by crush or otherwise, I would ask you to state whether, under those conditions, you would be more careful to test than otherwise?

A. I would be more careful; yes.

THOMAS TANGEY, being sworn as a witness in behalf of the defense, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. You reside at Grass Creek now, do you Mr. Tangey?

A. Yes, sir.

Q. You are a coal-miner by trade?

A. Yes, sir.

Q. How long have you been engaged in the business of coal-mining as a general occupation?

A. Somewhere about twenty-five years.

Q. In how many different States and Territories of the United — have you wrought as a miner?

A. I have wrought in Pennsylvania, Indiana, in Wyoming, along the Rhone.

Q. Are you familiar with the condition in coal mines called a crush or squeeze by coal-miners?

A. Yes, sir.

Q. State whether or not such condition as that, if you know, existed in the Grass Creek mine in May, 1885.

A. Yes, sir; there was.

Q. How long have you been acquainted with that mine?
A. I began to work there some five years ago.
Q. Been working there since, all the time?
A. No, sir; I was away for about sixteen months.
Q. Where were you then?
A. I was up in Idaho.
Q. You were working there, however, at the time Mr. Reddon got hurt?
A. Yes, sir.
97 Q. You were acquainted with Mr. Reddon prior to that?
A. Yes; I worked with him when he came there to work.
Q. You worked with him when he came there to work?
A. Yes, sir.
Q. In what kind of work were you engaged with him?
A. Well, when I worked with William Reddon we was cleaning up the fifth entry, and began to the slope, and——
Q. (Interrupting.) You assisted in that work that he has talked about?
A. Yes, sir; we was working together for some days, and then Mr. Reddon went to lay track, and I went on the night shift to fill coal and to lower track when it was wanted.
Q. Was this the general character of work that he did also?
A. Well, sir, he was carrying tools and fixing switches, putting in the road, and we at the night time was making place, so that he could throw the track up or down, where it was wanted, so that it would be no hinderment to him.
Q. I wish you would state, Mr. Tangey, what the character of the work is that men do—day workers—that is, company men—when they are cleaning up an entry. What does it consist of?
A. Well, sir, my orders was cleaning up loose coal, and, of course, if there was a piece of coal that was loose to take it down and fill it out, because there was a mule always taking away the coal from us, and we couldn't have time to go along and take up loose coal; we wanted to fill our cars as soon as we could, and we would take down the coal and put it in the car and send it out.
Q. Those men who worked in the entry, where they worked near the ribs, what was the usual rule with reference to inspecting the rib to see whether it was secure or not? State whether that was done by the men who were working along there—whether that was the rule, or somebody else did it.
A. Yes, sir; that was the rule.
Q. The men themselves inspected about where they were working?
A. Not—yes, sir; not to put themselves into danger.
Q. Was that the rule that you always adopted as——
A. (Interrupting.) Yes, sir.
Q. —company men when you were working——
A. (Interrupting.) When I was day working.
Q. Is there any difference in the reason why a man should inspect the wall or rib there for his own security and the reason for the inspection a miner makes in his room?
A. Well, sir——

98 Q. (Interrupting.) The reasons are the same there. He should inspect in one place, if his work is there, as he does in the other?

A. If he don't he is going to pay the penalty, because a man isn't going to work in a dangerous place, and, of course, it is natural a man will look about him and see whether he is in danger before he will go to that place to work.

Q. How many different mines have you worked in, in your experience, in which this condition of crush was plainly discernible?

A. Well, every one that I have worked in there has always, more or less—that is, what we terminate a squeeze.

Q. What is the effect of a squeeze in a mine upon the tendency to cause coal to fall?

A. Well, sir, very often it is gas that is in the coal that works out; other times it is weight on the roof; when the rooms is driven up, something like that that causes it.

Q. Is there more liability for coal to fall if the pillars or ribs in a mine where a squeeze is going on than where it is not?

A. Yes, sir; yes, sir.

Q. What is your experience and general experience of miners as to coal loosening in a short time after its having been tested when there is a squeeze of the mine?

A. Gas, sir.

Q. Well, is it a fact that you will find it frequently loosened shortly after a test?

A. Yes, sir.

Q. Is that the experience generally in such mines, according to your observation?

A. Yes, sir; I have saw pieces as big as my head fly from the slope—coal in Grass Creek—and it would be as hard as marble, and just come right out.

Q. What do you attribute that to?

A. Gas, sir.

Q. Gas that is in there?

A. It works—that is, in the coal.

Q. So that is one of the causes of coal falling, is it?

A. Yes, sir.

Q. And the pressure is another cause?

A. The pressure of the roof is another cause, from the bottom.

Q. I wish you would state whether or not it is usual in working mines, and in the condition of a squeeze that this was at the time of this accident, for such mines to be closed up or abandoned or miners to quit work, or whether they continue to work fre-

99 quently in mines in the condition this was at the time of this accident.

A. Well, now, I don't understand exactly what you mean, Mr. Williams.

Q. Taking the condition with reference to squeeze that this mine was in at the time of this accident——

A. (Interrupting.) Yes, but it didn't squeeze all along.

Q. No; I understand that.

A. Because sometimes there was a squeeze on the roof in the night and in the day there would be no squeeze hardly at all.

Q. Then it operated at sometimes and other times——

A. (Interrupting.) Yes, sir; and other times not.

Q. Well, I ask you to take the general condition of a mine—whether it is usual in coal-mining to abandon a mine for that reason?

A. Yes, sir.

Q. It is usual not to work any longer?

A. No, sir; to work on.

Q. To keep on?

A. Yes, sir.

Q. It isn't usual, then, to abandon it?

A. No, sir.

Q. And the miners are familiar with this situation and work under those conditions?

A. Yes, sir.

Q. However, when that squeeze is going on it does have a tendency to increase the danger, does it not, on account of falling coal?

A. Yes, sir.

Q. Did you ever talk with Mr. Reddon as to how this accident came about that hurt him?

A. Yes, sir.

Q. When and where?

A. I believe, sir, it was about eight nights after he had got hurt. I went to stop up with Mr. Reddon to see him during the night, and I asked William Reddon how he got hurt, and he told me that he was loading some coal from the side of the track and he sounded this—he thought this coal was so bad—and he sounded this piece of coal, and it was bad, but he says he thought it would stand until he got through his work, and while he was performing his duty the coal came and catched him between the ribs and the cars.

Q. So he said that he had sounded it and found that it was bad?

100 A. Yes, sir.

Q. But thought it would hold until he got the coal shoveled up?

A. Until he got through where he was working.

Cross-examination of THOMAS TANGEY.

By Mr. BROWN:

Q. Did you receive your duties in orders from the foreman of the company or did you know them without any orders?

A. About the coal, sir?

Q. Yes. You have described what your duties were in the mine.

A. Well, sir, when there was lots of loose coal against the rib—of course, if there was a little we took it down without saying anything to our superintendent at all, and if it was a large quantity, of course, it would—the taking of it down would block the road up, and that

wouldn't do, if the entry and rooms—men that was on the track inside, they wouldn't be able to get cars if we was to take down large quantities on the road; they wouldn't be able to get cars on the inside, so we have to report it if this coal was coming down, and I have done so on two or three occasions to Mr. Thomas.

Q. Generally speaking, in doing your duty, did you do it in pursuance of orders or did you do it without orders?

A. Well, sir, when there was little, we done it without orders at all, because it was chiefly——

Q. (Interrupting.) You are all the time speaking of taking coal down, but I am speaking of any work you had to do. Did you usually do it in pursuance of orders or without orders?

A. Without orders.

Q. Without orders?

A. Yes, sir.

Q. You went to work in the mine without any orders at all, eh?

A. We asked for a job before we started, I guess.

Q. You did have orders when you started work each day, didn't you, what duty you were to do?

(No response.)

Q. Were your duties as a day man the same as those of a track-layer?

A. My duty was to fill coal and take coal from the ribs, so that we could make room, because the squeeze in the bottom—the
101 lower side of the track would come against the roof, and there wouldn't be height for the cars, and I used to clean up the loose coal and take it down from the rib, so that the track could be laid nearer up the rib all the time, to make height for the cars and the mule going through with the coal.

Q. That was your duty?

A. That was my duty, sir.

Q. And the track-layers were different; they were to lay the track after you made the place, wer-n't they?

A. To get switches in the room and repair the track all through.

Q. The track-layer wasn't expected to take down coal from the sides and roof, was he?

A. I don't know, sir.

Q. Didn't usually do it, did he?

A. I don't know, sir.

Q. Don't know what the track-layer did do?

A. Because we had neither one—I was six months working nights, doing——

Q. (Interrupting.) Had no track-layer around?

A. No, sir.

Q. When you had this talk with Reddon who was present?

A. Sir?

Q. Who was present when you talked with Reddon?

A. Well, there was no one but me and him.

Q. His wife not there?

A. No; Mrs. Reddon was out in another room, I believe.

Q. No one else sat up with him that night but you yourselves?
A. Yes; there was John Marshall with him.
Q. John Marshall?
A. Yes, sir.
Q. Where was he at the time of this talk?
A. I don't know, sir, whether he was present or not. I most think that he wasn't.
Q. Don't think he was?
A. No; I don't think he was there at the time.
Q. When did you report this conversation?
A. Report it?
Q. Yes.
A. What do you mean, sir?
Q. What do I mean? When did you tell of it?
102 A. Oh, well, as soon as Mr. what's he called came to Grass Creek.
Q. Van Cott?
A. Yes, sir.
Q. That is the first time, was it?
A. Yes, sir.
Q. Hadn't reported it or told it to the foreman or his assistants before that?
A. No, sir; never——
Q. (Interrupting.) You told Van Cott when he was out there?
A. Never spoke it to any one.
Q. You are still in the employ of the company, I take it?
A. Yes, sir.

Redirect examination of THOMAS TANGEY.

By Mr. WILLIAMS:

Q. If a man whose general business may be to work on a track is sent to clean up coal along the entry and by the ribs is his work in doing that different from any other day man who is set to do the same work?
A. No, sir.
Q. His danger is precisely the same in working along the rib as another man's would be whose regular business was to work there, is it not?
A. Yes, sir.

Recross-examination of THOMAS TANGEY.

By Mr. BROWN:

Q. Was anybody besides Marshall present at this conversation?
A. I don't know whether Marshall was present or not.
Q. Was anybody else there?
A. No- that I know of.
Q. Where is Marshall; is he here in town?
A. I don't know, sir.
Q. Have you seen him here in town?
A. No, sir.

JOHN WILLIAMS, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. WILLIAMS:

103 Q. You are a coal-miner by trade, are you?

A. Yes, sir.

Q. Are you working at that business now?

A. I am just now. I work generally part of the winter and fall, and farm the other part.

Q. How long have you been familiar with the work of coal-mining?

A. Well, about forty years, I guess.

Q. Since you were a boy, eh? First mined coal in the old country, did you—in Wales or England?

A. Yes.

Q. Different places in America have you mined?

A. Yes; several different places.

Q. Ever mined in the coal regions of Pennsylvania and that locality?

A. Yes, sir.

Q. How long have you been acquainted with the coal mines in Summit county, Utah?

A. Well, I suppose it would be about eleven years.

Q. Have you been engaged in working in those mines out there more or less since that time?

A. In Grass Greek?

Q. Yes.

A. Yes, sir.

Q. Do you know this Grass Creek mine in which Mr. Reddon was hurt?

A. Yes.

Q. How long have you been acquainted with that mine?

A. About ever since it was opened.

Q. Well, about how long has that been?

A. Five or six years, I guess.

Q. Five or six years? How long have you worked in that mine altogether, about?

A. Oh, I couldn't say; been working some winters and fall. I work two months and three months; some I work four months, and so on; generally about four months.

Q. Worked more or less in it every year since it was opened?

A. Yes, sir.

Q. Was you working there at the time Mr. Redden got hurt?

A. No, sir.

Q. Had you worked there in December and January previous to that?

A. Yes, sir; I worked along with Mr. Reddon awhile.

104 Q. Worked along with Mr. Reddon awhile? Are you acquainted with the methods that miners resort to to try or test their walls and roofs as to safety?

A. Yes, sir; I am.

Q. What is that test usually resorted to?

A. Well, generally get a pick and tap the wall (illustrating) or the roof, according to what we are testing.

Q. And you judge of its being safe or otherwise by the sound that it yields, do you?

A. Yes, sir.

Q. Is that the general method resorted to by all miners of coal?

A. Well, all that I know of.

Q. If a superintendent was to go to determine the question of safety or otherwise of a mine or entry how would he do it?

A. He would do it in the same way.

Q. In the same way? If a superintendent wasn't a practical miner would you consider him a competent judge of testing?

A. No, sir; I would not.

Q. You wouldn't conclude that I or Mr. Brown, for instance, would be very trustworthy judges, would you?

A. I wouldn't like to risk my life under your hands.

Q. Are you familiar with the condition of mines called by miners a squeeze?

A. Yes, sir.

Q. Have you been acquainted with those in all the different countries where you have wrought?

A. I have.

Q. How many different mines have you been working in where that was plainly discernible?

A. Some five or six.

Q. Some five or six? Was that the condition of the Grass Creek mine when you was working in there with Reddon a few months before he was hurt?

A. Oh, well, some parts of it.

Q. The effect of the squeeze will at one particular time show itself stronger in one part of the mine, and a few weeks or days afterwards it will show itself in another part, will it not?

A. Yes, sir.

Q. What is the effect in a mine where this condition of squeeze is going on with reference to increasing the liability of coal to fall? State whether it does increase its liability or not.

105 A. Well, the squeeze and the gas has different effects—water; there is three causes.

Q. They all tend to increase the liability to fall, do they?

A. Yes, sir.

Q. State whether or not the condition that you found this coal mine in at the time you were doing work there with Reddon was similar generally to other mines where the squeeze has been operating, where mining has been going on.

A. Yes, sir.

Q. Same general effect you found there, eh? Where was that effect most noticeable in this mine—in the roof or floor?

A. Oh, on the floor.

Q. What was the composition of the floor? What was it?

A. A kind of a mixture of clay and dirt.

Q. Clay and dirt?

A. Principally; some portions of it——

Q. (Interrupting.) It was softer, then, than the roof, as a rule, was it?

A. Yes, sir; in that portion of the mine.

Q. What was the effect of this squeeze upon timbers that were put in that mine?

A. Well, some parts of the mine—there is a difference in that, too; the rock had a tendency to break in some places, and other places there was water, and I put timber in—good, strong timber in there, in that mine, and in a week or so, why, they would be broke.

Q. Be broken down?

A. Yes; on two days I have put them, and they have been broke.

Q. What say?

A. In two days I have put them, and they have been broke.

Q. That would be on account of the work of the squeeze, would it?

A. Yes, sir.

Q. In other words, the pressure becoming so great that it would break the timbers?

A. Yes, sir.

Q. Some of the work that you have done in that mine was timbering, was it?

A. Yes.

Q. Timbered some on this fifth entry?

A. Yes; there is more timbering than anything else—about equal part, I guess.

106 Q. The fall of coal was quite frequent in that entry, was it not, along from the ribs?

A. Yes; I expect it was; we was cleaning it up; it had fell and closed up.

Q. Were you acquainted with the entry the few weeks or months just following the time that you quit timbering there?

A. Well, for about four weeks I was.

Q. For about four weeks coal was liable to fall, and did fall, didn't it, during that time?

A. Yes, sir; a fall or two most every day or night; more so in the night than in the day.

Q. Had a tendency to fall more in the night than in the day?

A. Yes, sir.

Q. I wish you would state whether it was the usual part of the work each day to clean up falls of coal in that entry.

A. Well, I couldn't say for that.

Q. Couldn't say whether it was almost daily or not? It was very frequent, was it not?

A. Yes, sir; one or the other of us had to do it.

Q. I wish you would state what your experience is in a mine where a crush is going on with reference to the loosening of coal suddenly or in a short space of time after it has been examined and found solid.

A. Well, my experience is, I have sounded coal one hour, and the next hour it would be down on the floor.

Q. In an hour after you had tested it and it appeared solid? If a man were working in an entry shoveling coal, where the rib was near him, into a car—between the car and the rib—I would ask you to state whether or not there would be the same necessity for his looking out for the wall as where he is mining in a room to see whether it is safe or not.

A. Well, it is quite a different thing in that; in a room a man is working to get the coal down, and he looks for something loose, and wants it loose to get it down.

Q. That is his business, to loosen it?

A. That is his business, to loosen it; to look for it.

Q. But when he gets a shot made, before going to take the coal out in his room, he looks to ascertain whether there is any more loose, doesn't he?

A. After he gets a shot out?

Q. After he gets a shot out, and after having got a shot out, he don't undertake to work without giving some attention to see whether there is any more that is liable to fall down before
107 he gets that out, does he?

A. Well, he generally works away and gets all the loose down.

Q. Before he goes to work?

A. Yes, sir; that is his business.

Q. And if there was, as you say, in this entry frequent falls of coal along the ribs, I would ask you to state whether or not that would warn a man to look out for the ribs if he was shoveling right along close to them.

A. Well, it would warn some; it would warn some a great deal more than others.

Q. It would warn some a great deal more than others, but if he saw that it was in the habit of falling and did fall frequently and that was known to a party, why, that would be naturally a reason why he would give some attention to it, would it not?

A. Yes; he would give more or less.

Q. Some men give more attention to it, don't they?

A. Yes; some men will work under a piece of coal where others wouldn't for their life.

Q. You notice that difference in men?

A. Yes, sir.

Q. You notice that difference in men?

A. Yes, sir.

Cross-examination of JOHN WILLIAMS.

By Mr. BROWN:

Q. Why do you timber at all?

Q. Why do I timber?

A. Yes.

A. I can tell you several reasons for it.

Q. That is what I want to know, all of them.

A. In the first place, to keep the roof up, as a general thing. That is my use of timbering, and another use is to keep the wall up.

Q. The sides?

A. Yes, sir; and another use, why, put laggings up to keep the dirt in. We have three. They neither need them in the roof in order for the coal, but to hold laggings to put dirt behind them.

Q. Does timber have these three effects that you have described as the objects in timbering?

A. Yes, sir.

108 Redirect examination of JOHN WILLIAMS.

By Mr. WILLIAMS:

Q. You put lagging up sometimes behind upright timber to throw dirt out of the way behind that, to keep it from rolling down?

A. Yes, sir.

The COURT:

Q. Whas is the cause of this squeeze? Was it because too much coal had been taken out or because it wasn't properly timbered, or what?

A. Well, when the coal was taken out that caused pressure.

Q. The squeeze or settlings, are they liable to occur when there is not too much coal taken out?

A. Well, not if there is not too much; sometimes it will, in case of gas.

Q. Gas does cause it to settle, does it?

A. Cause what?

Q. I was asking what was the cause of the settling. You speak of the settling.

A. Well, the gas works with the coal and makes it all loose.

Q. I was asking about the settling. What made the squeeze or——

A. (Interrupting.) Well, the gas causes it in a great many cases I believe. When so much coal is taken out, why there is a vacancy there and the pillars are not able to hold the earth up.

Q. Well, is it customary in mines to have any one to inspect entries and test them?

A. Well, yes; it is customary to have a foreman or superintendent.

Q. A man to inspect the mine, to test these entries, the walls and the roof?

A. Yes; it is necessary to have a man to do it.

The COURT: That is all, sir.

Recross-examination of JOHN WILLIAMS.

By Mr. BROWN:

Q. Does timber prevent the settling of the pillars?

A. Does it prevent it?

Q. Yes; or have a tendency to prevent it. Does it help prevent it?

A. No, sir.

Q. Don't help it at all?

109 A. No, sir; it helps to keep it up, though, from falling.

Q. Putting in timbers strengthens the pilla-s that are left, does it not?

A. Not much.

Q. Not much?

A. No, sir.

Q. Don't help any?

A. No, sir.

Q. Don't help keep up the mine?

A. Very little, in case of solid roof.

Q. Very little, where the roof is solid?

A. But it keeps the coal in its place from squeeze or falling out on the track.

Q. Keeps coal in its place from falling out on the track?

A. Yes, sir.

WILLIAM WILLIAMS, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination.

By Mr. WILLIAMS:

Q. What is your age?

A. My age is twenty.

Q. What is your business?

A. Well, sir, I have been working in the mine for about four—between four and five years.

Q. In the Grass Creek coal mine?

A. Yes, sir.

Q. At what different kinds of work have you been engaged?

A. Well, most every kind of work in the mine.

Q. You have mined coal some?

A. Yes, sir.

Q. Have you ever been engaged in driving a mule back and forward in the entries?

A. Yes, sir; that is the biggest part of my work.

Q. Boys usually engage in that, do they not?

A. Yes, sir.

Q. Boys drive the mules back to draw the cars out to the slope?

A. Yes, sir.

Q. So that they can hitch them on to be pulled up?

A. Yes, sir.

110 Q. Was you ever employed in that business on the fifth west entry in this coal mine?

A. Yes, sir.

Q. Where Mr. Reddon was hurt—were you engaged in that mine at the time he was hurt?

A. Yes, sir.

Q. What was your business at that time?

A. Well, sir, I was loading that afternoon, the next car to him west.

Q. The next car west of *of* him; you were loading coal?

A. Yes, sir.

Q. What was your general business about that time?

A. Driving mule.

Q. Had there anything happened along the entry to interfere with your passage of the cars that afternoon or day?

A. Yes, sir.

Q. What was it? State to the jury.

A. The track had heaved up, and the cars wouldn't run through under the rock.

Q. Would they pass the day before?

A. Yes, sir.

Q. So that it had heaved up so that they would catch on the lower side?

A. Yes, sir.

Q. About how many men were engaged at work in that entry that afternoon, if you remember?

A. Well, there was somewhere about from ten to fifteen, I suppose.

Q. Quite a number?

A. Yes, sir.

Q. You were set there to do what particular thing?

A. We were set there to load the loose coal along up side of the rib, to throw the track up the hill.

Q. Move the track nearer to the ribs?

A. Yes, sir.

Q. What was the fact in that entry at that time—you were familiar with it, going backward and forward with the mule—as to the fall of coal? State whether or not there was frequently fall of coal from the ribs.

A. Yes, sir; there was falling more or less every day.

Q. You think every day it fell more or less?

A. Yes, sir.

Q. State whether or not cars were filled from this falling coal.

111 A. Yes, sir; there was——

Q. (Interrupting.) You used to drive cars out to the place, did you?

A. Yes, sir; there was a couple of men here and there just for that purpose.

Q. Those were called day men——

A. (Interrupting.) Yes, sir.

Q. —company men. Do you know whether those men were in the habit when they were at work of pulling down loose coal when they saw it was loose—about to fall?

A. Yes, sir; when they thought it was dangerous.

Q. They would pull it down?

A. A man ain't supposed to run any risks.

Q. State whether you observed in that entry the effect of the crush that was going on on timbers that were put up.

A. Yes, sir.
Q. What was the effect?
A. Well, sir; you would put timbers up, like to-day, and they would likely be broke in a couple of days on account of the squeeze—heavy weight.
Q. Was that frequently the case——
A. (Interrupting.) Yes, sir.
Q. —that shortly after they were put in they would be broken again?
A. Yes, sir.

(No cross-examination.)

GOMER THOMAS, being sworn as a witness in behalf of the defense, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside, Mr. Thomas?
A. Grass Creek.
Q. In what business are you engaged at this time?
A. Superintendent of the mines—coal mines.
Q. Grass Creek mines?
A. Grass Creek.
Q. Are you a coal-miner by trade?
A. Yes, sir.
Q. How long have you been engaged in that business as a general employment?
A. What, in coal-mining?
112 Q. Yes; coal-mining generally.
A. About thirty-five years.
Q. About how long?
A. Thirty-five.
Q. Thirty-five years?
A. Off and on around coal mines—that is, working in coal mines.
Q. How old are you?
A. I am forty-one.
Q. Been engaged in it, then, since you were quite a small boy?
A. Six years old; yes, sir.
Q. In what different countries have you mined?
A. Wales and America.
Q. How long have you been in Utah or Wyoming?
A. Been in Utah about eight years, along somewheres.
Q. About eight years?
A. Yes; well, off and on. I have been to Wyoming a few years.
Q. I say in Utah and Wyoming.
A. Yes, sir.
Q. When did you first become acquainted with and work in this Grass Creek mine?
A. Along about 1880—the year 1880.
Q. In what position were you first engaged?
A. Miner.
Q. Digging coal?

A. Yes, sir.

Q. Have you ever been a day or company man in that mine?

A. I have.

Q. About how long were you engaged in that kind of work?

A. Well, I was track-layer, a kind of assistant foreman, doing odd jobs in the mine for about a year and a half or two years, probably.

Q. A kind of assistant track-layer, and doing odd jobs?

A. Yes, sir.

Q. Are you acquainted with the class of men, as to employment—whether day men or piece men—that are usually put to do work in the entries in clearing up coal?

A. Yes, sir.

Q. What are they?

A. They are generally miners, the majority.

Q. Well, as to employment, day or company men, are they?

A. They are company men.

113 Q. Mean by that they are paid by the day?

A. By the day.

Q. And do different jobs, as they are called on?

A. Yes, sir.

Q. State, if you know, what the duties of such men are when they are put to clean up an entry or loose coal, with reference to inspecting the ribs or taking down coal where it is needed to be.

A. It is the day man's duty wherever he is sent to examine the place he is going to work in the first thing he does. That is the general rule—to examine it and see if it is safe to work.

Q. Is there any rule known to you or in your experience in mining where, when a miner is set to work, they are in the habit of sending any other person along to determine whether or not coal is liable to fall on him?

A. No, sir; the miner is supposed to——

Q. The miner does that himself?

A. He does that himself; yes, sir. The rule is, there is a man goes around every morning to inspect the places, and he reports to the foreman if there is anything wrong, but as quick as the miner comes to his place, why he is supposed to look after himself.

Q. And those inspectors are different in different mines, are they not; as, for instance, in a mine that is subject to fire-damp, or other noxious gases that accumulate, they have a gas inspector, do they not?

A. Yes, sir; we have one in ours.

Q. You have in yours?

A. Yes, sir.

The COURT:

Q. You say you send an inspector around every morning?

A. Yes, sir; every morning; goes around every place in the mine.

Mr. WILLIAMS:

Q. Now, when a man is set to work, as Mr. Reddon was in this case, to load up coal along a rib and in an entry where, from condition of squeeze or otherwise, falls of coal are frequently going on, I would ask you to state what, in your judgment as a miner, a man under those circumstances ought to do, where he is working close to a rib, with reference to looking out for falls.

A. Well, it would be his duty to see what is around him, to feel it, and tap the roof and sides. If anything was loose it was his duty to take it down.

Q. If known to him falls of coal were frequent, state whether or not that ought to increase his vigilance.

114 A. Yes; it would put him more on the guard.

Q. You are acquainted with the condition called crush or squeeze in a coal mine, I suppose?

A. Yes, sir.

Q. How many different coal mines have you worked in where that was plainly discernible?

A. I guess I worked in about ten or fifteen different mines.

Q. Where you could plainly see the effects of that going on?

A. Yes, sir.

Q. It is the usual rule to still carry on mining in such mines, is it?

A. Yes, sir; it is the same rule all over.

Q. And miners are familiar with the consequences of such squeeze?

A. Yes, sir.

Q. It does, however, increase the peril or liability of coal falling, does it not?

A. Oh, yes; it loosens the coal all over in the roof if there is any soft roof.

Q. Where were you on the 25th of May? Were you working at this mine then?

A. No, sir.

Q. Twenty-fifth of May, 1885?

A. I was foreman at Alma, at number three.

Q. Foreman at Alma, Wyoming, at the time?

A. I had just left Grass Creek.

Q. You had just left Grass Creek?

A. Yes, sir.

Q. You were working there in the spring of 1885, were you?

A. Yes, sir; I went there the 20th day of February.

Q. What were the circumstances of your working there then?

A. My brother was sick and sent to the hospital, and they moved me from Alma and gave me charge of Grass Creek.

Q. In his place while he was sick?

A. Yes, sir.

Q. What time did you leave there?

A. I left there on the morning of the 12th of April.

Q. Mr. Reddon was working there during the time that you were there, then?

A. Yes.

Q. At what character of work, and what were all his duties?

115 A. Well, he was working around the tracks, timbering, loading coal, preparing tracks.

Q. He was a company man during that time?

A. Yes, sir.

Q. Where did he load coal—in rooms or entries?

A. Entries.

Q. Entries?

A. Most of it was down on the sixth, if I recollect right.

Q. When was he loading coal in the entry or clearing up that? What would be his duty under his employment with reference to inspecting or watching for coal to fall or taking it down if it was dangerous?

A. It would be his duty wherever he was sent or what kind of work he was going at to inspect his place and see if it was safe to work it; that would be the first thing he would do.

Q. Is there any difference as to the questions of examining a rib, where a man is working along the entry, with reference to its security and examining his room when he goes in that to work?

A. No, sir; that is all alike; it is all the same rule; works all over in a mine.

Q. And if along an entry where there were frequent falls of coal, and that was known to a party who was sent to work there, what influence ought that to have on his conduct?

A. It ought to put him more on the guard to protect himself.

Q. So he should be more careful than under other circumstances?

A. Yes, sir.

Cross-examination of GOMER THOMAS.

By Mr. BROWN:

Q. Were the duties of a track-layer the same as those of other day men?

A. All but the laying of the track.

Q. All but the laying of the track?

A. Yes.

Q. If he were sent to fix a piece of track was it his duty to tap over the heads and sides before he laid the track?

A. Yes, sir.

Q. Always his duty to take his pick along?

A. He has got his tools with him always.

Q. How?

A. He has got his tools with him always; it is a duty; of

116 course you would call it a duty, but it is a rule wherever a man would work in a coal mine, even on the slope; as soon as he leaves the surface it is a coal-miner's duty to see to his place, even if he is sitting down.

A. Carry a pick, besides hammer and nails and other things, and test the sides?

A. Well, he carries his set of tools—pick, shovel, and so on.

Q. Is it his duty to always test the sides and roof?

A. For his own safety; yes, sir.

Q. That is always done?

A. That is always done; yes, sir.

Q. Is it his duty to take down coal in the same way in the entries as it would be in the room?

A. Well, it depends on circumstances; what he is doing. He has got no right to take coal out except as going there to work, and same after they go.

Q. He wouldn't be justified in taking down a pillar of coal?

A. He would be justified in making himself safe.

Q. He wouldn't be justified in taking down a pillar of coal, would he?

A. Oh, no.

Q. In a room he is justified in getting down all he can, the more the better, I suppose?

A. A miner; yes.

Q. But in the entry-way he is only justified in taking down that which is dangerous, so that he can pass back and forth. That is the difference, is it?

A. Yes; so that he is safe to work.

Q. These entry men and track-layers had to go to whatever places and whatever duty ordered, did they not?

A. Yes, sir.

Q. What were the purposes for which you used timber in that mine?

A. We used timber for keeping up the roof where it was bad.

Q. Also the walls?

A. In some places we strike a streak of soft coal that wouldn't stay up without propping it and lagging it?

Q. What kind of timber do you use to support the walls—lagging?

A. Yes; put up timber.

Q. And props to support the roof?

A. Yes, sir.

117 Redirect examination of GOMER THOMAS.

By Mr. WILLIAMS:

Q. It isn't necessary for a man, if he is going to fix track, to take along a pick to sound, is it? He has got a hammer; won't that answer the purpose just the same?

A. He always carries his pick with him; he uses a pick more or less.

Q. He uses a pick in track-fixing?

A. Yes, sir.

Q. A hammer or anything of that sort——

A. (Interrupting.) Anything, a hammer or spike bar.

Q. —will answer to test the wall with?

A. Yes, sir.

Q. But you say it is usual for even a track-fixer to have a pick along?

A. Yes, sir; there is two men goes together; they take the set of tools with them.

Q. About the same tools that are used in mining?

A. About the same, only a smaller quantity.

The COURT:

Q. What kind of an instrument does an inspector use—a hammer or a pick?

A. Well, he don't carry anything particular; he takes a safety lamp wherever he stops and finds anything wrong——

Q. Don't he test the walls?

A. No; not without he sees something.

Q. Suppose he does see something?

A. Well, he will test it and report to the foreman.

Q. Does he take the hammer with him?

A. No; he will find tools in every place he goes.

Q. In the entries?

A. Well, not along the entries; he generally won't find anything; it is all rooms, more or less.

Q. Whose business is it to inspect the entries?

A. Well, the foreman——

Q. (Interrupting.) Suppose there is no foreman at work in there?

A. There is this class of men——

Q. (Interrupting.) Who sees after the entries?

A. Well, this class of men—day men; it is their business in general; there is mostly one or two or three or four working on each entry; it is their business——

118 Q. (Interrupting.) To inspect the entries?

A. To inspect the entries and see that there is nothing wrong; it is the only inspection we have got on entries.

Defence rest.

Rebuttal.

WILLIAM C. REDDON, being recalled for further direct examination, testified as follows:

By Mr. BROWN:

Q. Mr. Reddon, Mr. Tangey testified that he had a conversation with you about eight days after you were hurt. He was there in the night attending to you, and that you told him that the way you came to be hurt was that you had sounded the coal and found it bad, but you thought it would stand until you got through with your job. I want to know if you told him any such thing as that.

A. No, sir.

Q. Not that in substance?

A. No, sir.

Q. I call your attention to the testimony of Harry Thomas. He testifies that you pulled down with your pick about fifty pounds of coal before you started to load any. What do you say as to that?

A. Not my recollection at all.
Q. That is not your recollection?
A. No, sir.

Recross-examination of WILLIAM REDDON.

By Mr. WILLIAMS:

Q. May you not have pulled down some coal there that struck you as being loose?
A. Yes, sir.
Q. And forgotten it?
A. No; I don't think so; not to my recollection.
Q. You have no recollection that you did so, and think you did not?
A. No, sir; I did not, to my recollection, ever lift a pick to sound the coal at all.
Q. Did you have any talk with Mr. Tangey at all about this accident?
119 A. No, sir; about——
Q. (Interrupting.) About how you got hurt?
A. No, sir.
Q. Not at all?
A. Not at all.
Q. At any time?
A. Yes; I have at some other times, I expect; I don't know; the boys all asked, more or less, you know.
Q. You don't remember, though, whether you ever at any time had any talk with him?
A. With who?
Q. Tangey.
A. Yes, sir; I talked with him.
Q. Did he go and tend you when you was in bed?
A. Yes, sir.
Q. And did he never ask you, "Will, how did it happen that you got hurt"?
A. Yes, sir.
Q. Anything of that sort—and you never told him any such thing as he testified to?
A. Not a word, sir.
Q. Nothing of that sort?
A. No, sir.

Testimony closed.

The foregoing is all the testimony introduced by the said parties respectively upon the said trial and is the whole of the evidence submitted to the said jury.

Upon closing the testimony and after argument to the jury by the counsel of the parties respectively the court gave the jury the following instructions, to wit:

GENTLEMEN OF THE JURY:

1. The court charges you that negligence is the failure to do wha a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing that which such a person under the existing circumstances would not have done. The essence of the fault may be in omission or commission.

2. Where the defendant has been guilty of negligence causing the injury the right of the plaintiff to recover depends upon the facts. The question in such case is whether the injury was occasioned
129 by the negligence or improper conduct of the defendant; second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution that but for such negligence and want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover.

3. Ordinary care implies the exercise of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight the care required to avoid it may be slight; but if the danger is extraordinary and imminent extraordinary care and vigilance should be used to avoid it. The want of such care is negligence.

4. If the jury find that the plaintiff was injured in consequence of the negligent condition of that part of the mine where the accident happened, and that that part was left after notice in such a condition as a careful employer would not have left it, and if you also find that the plaintiff was not guilty of contributory negligence, then the plaintiff is entitled to recover.

5. What contributory negligence is which will prevent the plaintiff from recovering must be determined by the jury according to the circumstances of the case in evidence.

6. If the jury find that the plaintiff acted with ordinary care and as an ordinarily prudent man would act in remaining in the employ of the defendant and in the manner of doing his work and with respect to the conditions at the time he received the injury, then the plaintiff is not guilty of such contributory negligence as will prevent his recovery in this case.

7. You are further charged, gentlemen of the jury, that the defendant was not the insurer of the safety of the plaintiff in its employ. It simply engaged to exercise ordinary care, to keep the mine and the workings in a reasonably safe condition, and if it failed to do so it is liable to the plaintiff for any injury which may have befallen him by reason of such failure while the plaintiff was engaged in the due course of his employment, provided that you believe from the evidence that the plaintiff at the time was free from fault or negligence on his own part.

If the jury find from the evidence that the entry in which the plaintiff was working at the time he was injured was unsafe and very dangerous, and that he, prior to and at that time, knew or had

the means of knowing that fact equally with the defendant, he cannot recover for such injury, although received by reason of
121 such unsafe condition, unless you further find from the evidence that the plaintiff called the attention of the defendant's foreman to such danger or notified the defendant thereof and the defendant by its proper agent assured the plaintiff that the danger would be remedied within a reasonable time, and the plaintiff relying thereon continued to work. What will constitute such reasonable time is to be determined by you from the circumstances and the character of the danger; and if a reasonable time had expired before the accident causing the injury took place the plaintiff had assumed the risk of the peril.

8. You are further instructed that if you find from the evidence that the defendant objected to working in said mine prior to his injury in consequence of the dangerous condition it was in, and that he was induced to and did continue in said employment thereafter and until he was injured, in consequence of the assurance or promise on the part of the defendant that the said condition should be remedied, then during the period that the plaintiff was so induced to continue in such service it was his duty to exercise a high degree of care and caution to avoid injury from the danger of which he had complained, and if at the time of receiving the injury complained of he was not, in view of all the facts and circumstances, exercising reasonable care and caution he is not entitled to recover.

9. An employee must possess a fair measure of skill for the service he undertakes, and it is his duty to inform himself of the duties and dangers incident to his work. In going about his work he should do so with his eyes open and with a reasonable exercise of his faculties. He must not wait to be told to use care for his own safety, but must act affirmatively and use ordinary care to avoid dangers which are likely to beset him in his service. He is held by his contract of hiring to assume the risk of injuries from the ordinary and usual dangers of the employment.

10. If you find that the danger to which the plaintiff was exposed by the liability of the coal to fall at the time and place he was injured could have been ascertained by the exercise of reasonable diligence, and the means of ascertaining such danger was equally within the reach and power of the plaintiff as of the defendant and he failed to do so, or knowing the danger he omitted reasonable means to guard against it, the defendant is not liable.

11. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe and that the danger was imminent, but still concluded it would not fall before he and his fellow-
122 laborers could clean up the loose coal at that place, then the plaintiff cannot recover.

12. If you are satisfied from the evidence, gentlemen of the jury, that the plaintiff has a right to recover you should award such damages as will, in your judgment, fully compensate the plaintiff

for the injuries and losses that he may have sustained in consequence of the alleged misconduct of the defendant.

13. In estimating the damages the jury may take into consideration whatever of bodily and mental pain and suffering the plaintiff has endured and the fact (if such be the fact) that by reason of the injuries he received he may not be as well able to labor and earn a living hereafter as he was before the injury; also the extent to which his injury may permanently disable him.

14. You are further charged, gentlemen of the jury, that you are the judges of the credibility of the witnesses who have testified before you and of the weight of the evidence; you are the judge- of fact. In judging of the credibility of the witnesses you have a right to take into consideration their deportment and manner upon the stand, their capacity to understand, and their opportunities for knowing, and their capacity to remember that to which they testify, and you have a right also to take into consideration any motives that may appear from the evidence which any witness may have to speak truly or falsely. You have a right to take into consideration any fact in evidence which in your judgment may affect the credibility of any witness. You should treat each witness fairly and give to his testimony such weight as you think it entitled to.

In weighing the evidence you shall consider the evidence all together and draw only reasonable conclusions from it. You should not draw any unreasonable or strained conclusions, but should consider the evidence fairly, impartially, and candidly, and, so considering it, reach such reasonable conclusions as you may be able.

If you find for the plaintiff, you will find in your verdict the amount of damages to which you believe him entitled under the evidence. If you find for the defendant, you will simply find a verdict for the defendant.

To the giving of which said instructions numbered 4, 5, 6, 12, and 13, respectively, and each of them, so given at the request of the said plaintiff, the said defendant then and there excepted.

The above and foregoing are all the instructions given by the court to the jury in said action, and the same were given in the form and order as above set forth.

123 The said defendant also requested the said court to give to the said jury certain other instructions, which were reduced to writing and numbered by defendant respectively 1, 2, 3, 4, 5, 6, 7, 8, and 9, and which were in the form and language following, to wit:

1. One who, by his own negligence, has brought an injury upon himself cannot recover damages for it. A plaintiff in such cases is entitled to no relief, but where the defendant has been guilty of negligence also in the same connection the right of plaintiff to recover depends upon the facts. The question in such cases is, first, whether the injury was occasioned entirely by the negligence or improper conduct of the defendant; or, second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution on his part that but for such

negligence or want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover.

2. Ordinary care implies the exercise of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight the care required to avoid it may be slight, but if the danger is extraordinary or imminent extraordinary and imminent care and vigilance should be used to avoid it, because such would be the natural course of a prudent person. The want of such care is negligence.

If, therefore, you find from the evidence that the plaintiff at the time of receiving the injury complained of knew or had the means of knowing the dangers of his situation and did not exercise that care and vigilance which were fairly required by the circumstances and his surroundings, and such omission on his part contributed to cause said injury, he is not entitled to recover in this action and your verdict should be for the defendant.

3. A master is never the insurer of the life or safety of his servant. He simply engages to exercise ordinary care in furnishing and keeping his machinery, appliances, structures, or workings, as the case may be, in a reasonable safe condition, and if he fails to do so he is liable to his servant for any injury which may befall him by reason of such failure while engaged in the due course of his employment, provided the servant is at the time ignorant of such failure and has not, in the exercise of reasonable diligence, the means of knowing it, and is also in that connection free from fault or negligence on his own part.

124 But if in any case there is a defect or unsafeness in the condition surrounding a servant while engaged in the business of his master, and this the servant knows or has the means and opportunity equally with his master of knowing, and without objection on his part, or, if he does object, still continues to work in such dangerous place without being influenced or induced to do so by reason or on account of the assurances or promises of his master that such defect or unsafeness shall be remedied within a reasonable time, he cannot recover for an injury received by reason thereof. If, therefore, the jury in this case find from the evidence that the entry in which the plaintiff was working at the time he was injured was unsafe and dangerous, and that he, prior to and at the time, knew or had the means of knowing that fact equally with the defendant, he cannot recover for such injury, although received by reason of such unsafe condition, unless you further find from the evidence that the plaintiff objected to continuing in said service on account of such dangers, but refrained from quitting it in consequence of assurances or promises on the part of the defendant that the danger should be remedied within a reasonable time. What will constitute such reasonable time is to be determined by you by the circumstances and character of the danger, and if such reasonable time had expired before the accident causing the injury

took place the plaintiff had assumed the risk of the peril, and in that case your verdict should be for the defendant.

4. If you find from the evidence that plaintiff objected to working in said mine prior to his injury in consequence of the dangerous condition it was in, and that he was induced to and did continue in said employment thereafter and until he was injured in consequence of the assurance or promise on the part of the defendant that the said condition should be remedied, then during the period that the plaintiff was so induced to continue in said service it was his duty to exercise a high degree of care and caution to avoid injury from the danger of which he has complained, and if at the time of receiving the injury complained of he was not, in view of all the said facts and circumstances, exercising that degree of care and caution which was fairly proportioned to the situation, he is not entitled to recover.

5. A servant or employee must possess a fair measure of skill for the service he undertakes and it is his duty to inform himself of the duties and dangers peculiar to his work. In going about his work he should do so with his eyes open and with a thoughtful exercise of his faculties.

He must not wait to be told to use care for his own safety,
125 but must act affirmatively and use ordinary care to learn the dangers which are likely to beset him in his service. He is held by his contract of hiring to assume the risk of injury from the ordinary and usual dangers of the employment—that is to say, from such dangers as are known to him or are discoverable by the exercise of ordinary care on his part and such as are incident to the work, though unknown and not discoverable.

And if in this case the jury find from the evidence that the injury complained of resulted from a danger incident to his employment in the coal mine of the defendant, and that such danger was either known to him or by the exercise of ordinary care on his part he could have discovered it, the defendant is not liable.

6. If you find that the danger to which the plaintiff was exposed by the liability of the coal to fall at the time and place he was injured could have been ascertained by the exercise of reasonable diligence and the means of ascertaining such danger was equally within the reach and power of the plaintiff as of the defendant and he failed to do so, or knowing the danger he omitted to guard against it, the defendant is not liable.

7. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe, but still concluded it would not fall before he and his fellow-laborers could clean up the loose coal at that place, then he must take the consequences of his mistaken judgment, and your verdict will be for the defendant.

8. Although the law, as a general rule in such cases as this, requires an employer to exercise due care in supplying safe structures and instrumentalities for his servant to work with, yet he is not obliged by the law to do this absolutely. If the servant knows it at

the time he enters the service or afterward he becomes informed of the fact that such structures or instrumentalities are unsafe and dangerous, the employee having knowledge of his employer's habits and methods of conducting his business in this regard, and with such knowledge — upon or continuing in such service for the stipulated reward, cannot complain of such habits and methods or recover damages for an injury resulting therefrom; and if you find that it was the course pursued in this instance by the defendant to carry on the business of mining while the walls and surroundings in the mine were unsafe and dangerous, and this fact was known to the plaintiff, and that he also knew the character of the dangers there ex-
126 isting and yet entered upon and continued in said service, he assumed the risk of such dangers and is not entitled to recover in this action.

9. In this case, to warrant a verdict for plaintiff, you must find by a preponderance of testimony that the injury was caused solely by the negligence of the defendant, and that there was no fault, negligence, or carelessness on the part of the plaintiff that contributed to said injury.

But the court refused to give the said instructions so numbered 1, 2, 3, 4, 5, 6, and 7, respectively, or either of them, in the form, language, or substance as requested, but on the contrary changed and modified each of them, and thereupon gave said instructions to the jury in such changed and modified form, respectively, as appears by the said instructions of said court; to which action by the court in refusing to give to the jury each of said instructions numbered, respectively, 1, 2, 3, 4, 5, 6, and 7, in the form, language, and substance the same were asked by the defendant as above set forth, and in giving them and each of them in the changed and modified form, language, and substance as aforesaid, the defendant then and there excepted.

Also the court refused to give said instructions numbered 8 and 9, respectively, or either of them; to which refusal as to each of said requests numbered eight and nine, respectively, the defendant then and there excepted.

On the first day of December, 1886, the jury returned a verdict in favor of the plaintiff for the sum of twenty thousand dollars, and on the same day judgment in due form was entered thereon for said sum and costs, taxed at one hundred and twenty-eight dollars and seventy-five cents.

The said defendant now assigns the following errors and grounds for a new trial, to wit:

First.

Excessive damages, appearing to have been given under the influence of passion or prejudice.

Second.

Insufficiency of the evidence to justify the verdict, in this, to wit: The evidence fails to show it was the fault or negligence of the defendant which caused the injury complained of; further, the evidence does show that the plaintiff, prior to and at the time of receiving the injury complained of, had full knowledge and information of the liability and tendency of the coal and other ma-
127 terial to fall from the roof and walls of the said mine and entry where he was working at the time of receiving said injury, and also that the plaintiff was himself negligent in not testing the said coal and wall at the place of the accident before going to work there, or, if he did so test it and found it unsafe and dangerous, in going to work where he would be liable to be hurt on account of such unsafeness, and said negligence of plaintiff contributed to produce the said injury.

Third.

Error in law occurring at the trial and excepted to by the defendant, to wit:

1. The court erred in overruling the defendant's objections to the questions put to the plaintiff and other witnesses on his behalf touching the subject of the mine and entry not being timbered and relative to the stopping the timbering in the entry in which the plaintiff was injured.

Second. The court erred in overruling the defendant's motion for a nonsuit.

Third. The court erred in giving to the jury each of the said several instructions which it did give as aforesaid at the request of the plaintiff.

Fourth. The court erred in refusing to give to the jury each of the instructions asked by the defendant and numbered one, two, three, four, five, six, and seven respectively, in the form, language, and substance as requested, and in changing and modifying each of the said instructions as aforesaid and giving them to the jury in such changed and modified form.

Fifth. The court erred in refusing to give to the jury each of the said instructions asked by the defendant and numbered eight and nine respectively.

P. L. WILLIAMS,
Attorney for Defendant.

Received this statement this 22nd day of January, 1887, and hereby stipulate and agree that the same was served in due time.

ARTHUR BROWN,
Attorney for Plaintiff.

128 TERRITORY OF UTAH, } ss:
Salt Lake County, }

I, Charles S. Zane, the undersigned, judge of the district court of the third judicial district of said Territory, do hereby certify that the above and foregoing statement is by me allowed.

C. S. ZANE, *Judge, etc.*

Dated March 15th, 1887.

The said motion for a new trial having been duly argued and submitted, the said court afterward, on the 15th day of March, 1887, after expressing the opinion that the damages found by the jury were excessive and that the verdict should not have exceeded the sum of fifteen thousand dollars, suggested that if the excess above that was remitted by the plaintiff the court would overrule and deny said motion; whereupon the said plaintiff, by his counsel, in open court remitted the said excess of five thousand dollars, and thereupon the said court then and there overruled and denied the said motion; which order overruling said motion and recording said remission of the excess of said verdict and judgment over and above the said sum of fifteen thousand dollars is in the form following, to wit:

Title of Court and Cause.

The motion of defendant for a new trial herein now comes on to be heard, and the said motion is argued by P. L. Williams, for defendant, and A. Brown, for plaintiff, and the said plaintiff, by his said attorney, remits all of said judgment over and above the sum of fifteen thousand dollars. Whereupon, the said motion being submitted to the court, and the court being fully advised, it is ordered that the said motion for new trial be, and the same is hereby, overruled and denied, and defendant excepts.

(Title of Court and Cause.)

Notice of Appeal.

To said plaintiff and to his attorney, Arthur Brown:

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from
129 the judgment therein entered and made in the said district court on the first day of December, A. D. 1886, in favor of the said plaintiff in said action and against said defendant, and also from the said judgment as the same was modified and reduced on the fifteenth day of March, A. D. 1887, and from the whole thereof, and also from the judgment therein made and entered in the said district court on said fifteenth day of March, A. D. 1887, in favor of said plaintiff in said action and against said defendant in overruling said defendant's motion for a new trial in said action.

P. L. WILLIAMS,
Attorney for Defendant.

April 16th, 1887.

Title of court and cause. Notice of appeal. Copy received this 16th day of April, 1887. Arthur Brown, attorney for plaintiff. Filed April 16, 1887. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

We, the undersigned, attorneys herein, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, answer, verdict, judgment on verdict, notice of motion for a new trial, statement on motion for new trial, record entry of waiver by plaintiff of so much of judgment as exceeded fifteen thousand dollars and order refusing new trial, and notice of appeal in the above-entitled action filed in *my* office.

We further certify that an undertaking on appeal has been properly filed.

Witness our hands, at Salt Lake City, this 19th day of May, A. D. 1887.

P. L. WILLIAMS,
Att'y for Appellant.
ARTHUR BROWN,
Att'y for Respondent.

Endorsed: Title of court and cause. Statement upon motion for new trial. Filed March 15, 1887. J. M. Zane, clerk.

130 WEDNESDAY, *June 15th, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day.

* * * * * * *

WILLIAM C. REDDON, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant. } From 3d. Dist.

This cause, coming on regularly for hearing, was argued by P. L. Williams, for appellant; Arthur Brown, for respondent; submitted, and taken under advisement.

SATURDAY, *October 1st, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day, beginning at two o'clock p. m., pursuant to adjournment.

Present and presiding, the Hon. C. S. Zane, chief justice; present also, the Hon. J. S. Boreman, associate justice; the Hon. H. P. Henderson, associate justice; the clerk, marshal, and members of the bar.

Court was duly opened and the record of the last session read and signed.

WILLIAM C. REDDON, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant. } From 3d Dist.

131 This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment and order of the district court appealed from be, and hereby are, affirmed, and that respondent have and recover of and from appellant his costs herein.

Further proceedings are stayed till the 17th instant.

MONDAY, *October* 17*th*, *A. D.* 1887.

* * * * * * *

WILLIAM C. REDDON, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant. } From 3d Dist.

Upon application of counsel of appellant it is ordered that the amount of penal sum of supersedeas bond on removal of this cause to the Supreme Court of the United States be, and hereby is, fixed at $30,000.

132 & 133 Supreme Court, Utah Territory.

WILLIAM C. REDDON, Plaintiff and Respondent,
vs.
THE UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

HENDERSON, *J.:*

The plaintiff seeks in this action to recover against the defendant damages on account of a personal injury which he received while in its employ as a laborer in its coal mine. The evidence on the part of the plaintiff tended to show that the defendant was the owner of and was operating a coal mine known as the Grass Creek mine; that the mine consisted of extensive underground workings, requiring the services of a large number of miners and workmen; that during the time in controversy one Thomas Thomas was defendant's foreman, and as such had entire supervision of the mine and all the workings, employed and discharged laborers and prescribed their duties; that the plaintiff was a practical coal-miner and had been for some years; that on the 1st day of December, 1884, the plaintiff applied to Thomas for employment and was employed by him in defendant's mine; that the openings to and from the mine were through various entries, which were designated by num-
134 bers, and all entering on the vein of coal on an incline and were separated from each other by columns or partitions left

in the coal vein to support the roof, these partitions being known to miners as "ribs;" that through all these entries tracks were laid and horse cars run for a great distance into the mine for the purpose of bringing out the coal; that at the time the plaintiff was employed, for some time before, and from that time up to the time of the injury there was going on in said mine what is known among miners as a "squeeze," which consists of the settling of the base of the columns or partitions left to support the roof into the softer material of the floor, thereby causing the floor in the spaces to heave and masses of rock and coal to fall from the top and sides, rendering them more or less dangerous; that this process was more apparent in the fifth entry, making it more dangerous than the other portions of the mine; that when plaintiff commenced work he was, with other workmen, under the immediate supervision of the superintendent, set at work clearing up the debris which had fallen in the fifth entry on account of the "squeeze" and leveling the floor and relaying the car track, other workmen following and casing and timbering to protect from the falling material as fast as the entry was cleared, such work commencing at the mouth of the entry and extending along it toward the interior of the mine; that after such clearing
135 and timbering had proceeded for some days and had been extended back some distance from the mouth of the opening the superintendent, Mr. Thomas, directed the timbering stopped, and the workmen engaged in it were directed by him to assist in the clearing, giving as a reason that he was in a hurry to get the cars running through the entry, and saying he would timber it after the clearing was done, but that no further timbering or casing was done; that the clearing of the fifth entry was finished about January 15th following plaintiff's employment, and from that time up to the time of the injury, which occurred May 15th thereafter, the plaintiff was engaged as track layer and repairer, his duties as such calling him to the various entries and chambers of the mine connected therewith, laying track, removing debris therefor, putting in switches and connections between the various tracks going from one portion of the mine to another, as directed by the superintendent; that during all this time coal and other material was occasionally falling from the sides and roof of the various entries, but that it was falling most in the fifth entry beyond the timbering, and that such entry was dangerous and was so understood by the plaintiff and all the workmen; that the superintendent knew of the unsafe condition of the fifth entry, was constantly about the mine, and that
136 his attention was particularly called to its unsafe condition; that one of the workmen called his attention to it at the time he ordered the timbering discontinued, and told him that unless it was timbered some one would be hurt, and he replied that there was not time then, but that he would timber it after the entry was cleared; that three or four days before the injury, while the superintendent was passing along the fifth entry, the plaintiff called his attention to its unsafe condition and walked with him along the entry back of the timbering and back of the particular place where the injury occurred and notified him of its condition, and the su-

perintendent promised to fix it, the plaintiff himself stating the conversation as follows:

"A. I took him and told him this coal was going to fall if it wasn't taken down. I was afeard, and I took him in along the road, all the way in, sounded the coal for him, until I got him to the room where Mr. Locke worked—John Locke—and that was the dangerousest place there was, between his rib and the next one, and he says, 'Bill,' he says, 'that won't fall yet. You have no idea how this coal will hang;' and he says, 'I can't stop the turn to take it down now, but,' says he, 'I will take it down some other time.' Them was just the words that was used, as near as I can get at it.

Q. What more did he say, if anything, than that he wanted to keep the turn running?

137 A. Why, he didn't say nothing, only as I told you. He said that he couldn't stop the turn then to take it down; that he would take it down some other time; have it taken down. He didn't take it himself, of course.

Q. He said he would take the coal down?

A. Yes, sir; he would have it taken down. He didn't work his own self."

That on the 25th day of May the plaintiff was called from another part of the mine by the superintendeat and was directed to go into the fifth entry, at a place beyond the timbering, but not at the particular place where plaintiff had called the attention of the superintendent to the loose coal, and there load up some coal which cumbered the track. The plaintiff commenced the work, and within a few moments a large mass of coal fell from the sides onto the plaintiff, causing the injury complained of. The direction of the superintendent to do this particular work was testified to by the plaintiff as follows:

A. Mr. Thomas ordered me and Mr. Harry Thomas over there to go in and clear up the coal and lower the track.

Q. Well, what did you do after having received those orders?

A. I went in the entry and stayed there until the turn—we was a little ahead of the trip—that is, the turn coming in—the man that drove the cars; staid there until they came in, and Mr. Thomas came in also right behind the cars, and I asked him if I

138 should start in here, and he says, "Yes; clear right up, boys——

Q. (Interrupting.) Which Thomas do you mean?

A. Thomas Thomas. He says, "Hurry and clear up, for I want to send coal out here this evening."

The plaintiff's testimony further tended to show that the plaintiff knew from reputation and hearsay what effect a "squeeze" had on a mine, but had never had experience with one before; that Mr. Thomas, the foreman, had had experience in seven or eight "squeezed" mines before; that timbering or casing and removing coal as fast as it is loose from the walls would have lessened the danger and been a protection, and that such is the usual precaution

in mines undergoing a "squeeze," but that neither was done except the timbering above mentioned. The plaintiff was 36 years of age, had always been well and healthy before the accident, and the testimony tended to show that the injury received by plaintiff was to the nerves of the back and to the spinal column, and were permanent; that it was and is very painful, totally disabling him from any labor; that he requires the constant care and attendance of nurses; that he cannot dress or undress without assistance, and that his lower limbs are so far paralyzed that he has but little use of them.

At the close of the testimony for the plaintiff the defendant moved the court for a nonsuit on the ground that plaintiff had not
139 made a case entitling him to recover and because the plaintiff's testimony showed that he was guilty of contributory negligence, which was overruled by the court.

The defendant's testimony tended to show that the plaintiff, by the exercise of due diligence, could have avoided the accident by discovering that the coal which fell on him was loose; that he knew the dangerous condition of the mine and of the fifth entry, where he was hurt, and tended to contradict the plaintiff's testimony.

At the close of the testimony the defendant preferred a number of requests to charge. The trial judge did not follow the requests to charge, but formulated his charge to the jury, varying and modifying some of the requests.

The jury returned a verdict for the plaintiff for $20,000, and judgment was entered thereon.

The defendant thereupon moved for a new trial on statement, on the ground, among other things, that the damages were excessive. The court overruled the motion for a new trial upon condition that the plaintiff should remit $5,000 from the verdict and judgment; which the plaintiff did, and the motion for new trial was denied; and the defendant appeals to this court from the judgment and order overruling motion for new trial.

The first question arising upon this record is the ruling of the court in overruling the appellant's motion for nonsuit. The
140 first ground stated for a nonsuit raises the question as to whether, under this state of the case, the defendant is liable to the plaintiff for the acts of Thomas, the superintendent; and, if so, whether negligence or neglect of duty was shown which was the proximate and efficient cause of the injury. In the reported cases of the various States there has been much discussion and diversity of opinion as to the responsibility of masters for the acts and omissions of co-employés, and as to how far and under what circumstances agents and employés engaged in various departments of duty and service are fellow-workmen or co-employés with other servants, so as to exempt the master from liability for their acts; but we think that the great weight of authority in the State courts establishes the proposition that the superintendent of a mine, who has general and entire charge of the work, employs and discharges workmen, and directs their duties and employments, is not a co-employé with common laborers in the mine, whose duty it is to obey the orders of such superintendent, within the rule excepting the master from responsi-

bility for the acts and omissions of such superintendent, and that as to such common workmen the master is responsible for neglect of duty by such superintendent.

Ryan *vs.* Bagley, 50 Mich., 179.
Buckner *vs.* N. Y. Cent. R. R. Co., 49 N. Y., 672.
Malone *vs.* Hathaway, 64 N. Y., 5.
141 Little Miami R. R. Co. *vs.* Stevens, 20th Ohio, 415.
Railway Co. *vs.* Keary, 3rd Ohio St., 201.
Louisville & Nashville R. R. Co. *vs.* Collins, 2 Duval (Ky.), 114.
Ford *vs.* Fitchburg R. R. Co., 110 Mass., 241.
1 Redfield on Railways, 554.
Wharton on Neg., sec. 232.
Bowers *vs.* Union Pacific R. R. Co., 7 Pac. Rep., 251.

This rule is recognized and adopted by the Federal courts.
Chicago & Milwaukee R. R. Co. *vs.* Ross, 112 U. S., 377.
Hough *vs.* Railway Co., 100 U. S., 113.
Northern Pac. R. R. Co. *vs.* Herbert, 116 U. S., 642.
R. R. Co. *vs.* Fort, 17 Wall., 553.

Did, then, the evidence tend to show negligence on the part of the superintendent, or was the accident the natural result of the dangerous and hazardous business in which the plaintiff had voluntarily engaged to serve the defendant? One who engages in the employment of another for the performance of certain duties for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of the service, and the pay is presumed to be regulated to cover compensation for such risk. This is a part of the contract on the part of the employé, and this rule applies as well where the service in which he engages is naturally hazardous or extra hazardous. This is so well established by adjudications that references are needless. On the other hand, it is the duty of the master not to expose the servant in performing his duties
142 to hazards or perils which may be guarded against by proper diligence. It is his duty to observe all the care which prudence and the exigencies of the situation require, and to furnish reasonably safe and proper structures and instrumentalities to avoid danger. He is not required to furnish the safest known appliances and means of avoiding danger, but such as are usual and reasonable under the particular circumstances and exigencies, and this is a part of the contract of hire on the part of the master.

Hough *vs.* Railway Co., 100 U. S., 213.
R. R. Co. *vs.* Fort, 17 Wall., 553.
Wabash R. R. Co. *vs.* McDaniels, 107 U. S., 454.

The servant's exposure to hazards resulting from the violation of this duty on the part of the master is not within his contract of service, and the master is liable for injuries resulting therefrom.

Hough *vs.* Railway Co., *supra.*

We are of the opinion that the testimony clearly tended to show that the accident to plaintiff was the result of a violation of this duty on the part of the defendant, and should have *have* been submitted to the jury. The superintendent knew of the dangerous character of the mine, resulting from the process then going on in it. His attention had been expressly called to the danger in the fifth entry; he had recognized the danger and the necessity and propriety of timbering or casing, and of sounding along the walls and re-
143 moving the loose coal and debris, by promising that it should be done; and it is reasonable to suppose from the testimony that the accident would have been avoided if either had been done; but, representing the company, simply to facilitate its operations and suit its convenience, this precaution was neglected and the plaintiff subjected to the risk which resulted in his injury.

The ground most relied on by appellant for a nonsuit is "that the plaintiff was guilty of contributory negligence." At the close of the plaintiff's testimony the court should not grant a nonsuit on the ground of contributory negligence unless it affirmatively appears by his testimony. Contributory negligence is an affirmative defense, and the burden of showing it was upon the defendant.

Hough *vs.* Railway Co., *ibid.*
R. R. Co. *vs.* Gladman, 15 Wall., 401.
Wharton on Neg., sec. 423.
Bowers *vs.* Union Pacific R. Co., 7 Pac. Rep., 251.
Indianapolis & St. Louis R. R. Co. *vs.* Horst, 93rd U. S., 291.

A nonsuit should not be granted and the case taken from the jury unless the court will feel constrained to grant a new trial upon the same evidence.

Bowers *vs.* Union Pac. R. Co., *supra.*
Railroad Co. *vs.* Stout, 17th Wall., 657.
Randall *vs.* Baltimore & O. R. R. Co., 109 U. S., 47.

144 It is insisted by appellant that the plaintiff's testimony shows that he knew of the dangerous character of the mine and of the precautions taken by defendant to avoid accident, and that by continuing in his employ after such knowledge he was guilty of contributory negligence. If a servant, before he enters service or afterwards, discovers that the instrumentalities furnished for his protection are defective and understands, or by the exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection or without any promise on the part of the employer that such defects will be remedied, continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have waived all negligence and neglect of duty on the part of the master, and would be guilty of contributing to such negligence.

Hough *vs.* Railroad Co., *ibid.*
Greene *vs.* Minneapolis & St. Louis R. R. Co., 17 N. W. Rep., 378.

But where there is any evidence tending to rebut the presumption of waiver on the part of the servant it presents a case for the jury.

Hough *vs.* R. R. Co., *ibid.*
Greene *vs.* Minneapolis & St. Louis R. R. Co., 26.
Lansing *vs.* N. Y. Cent. R. R. Co., 49 N. Y., 521.

We think that the promise of the superintendent in this case to remedy the defect was very clearly evidence tending to rebut the presumption that the plaintiff by continuing in the employ-
145 ment assumed the increased risk caused by the defendant's neglect. In Hough *vs.* R. R. Co., before referred to, Mr. Justice Harlan, speaking for the court, quotes with approval from Shearman and Redfield on Negligence, section 96, as follows:

"There can be no doubt that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." And he cites in support of the doctrine thus stated Conroy *vs.* Vulcan Iron Works, 62 Mo., 35; Patterson *vs.* P. & C. & R. W. Co., 76 Pa. State, 389; Le Clair *vs.* St. Paul & Pac. R. R. Co., 20 Minn., 9; and, again, quoting from Cooley on Torts, he says: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurance that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurance removes all ground for the argument that the servant by continuing the employment engages to assume the risks." See also Greene *vs.* Minneapolis & St. Louis R. R. Co., *ib.* In this case the plaintiff called the attention of the superintendent to the defect and
146 made known his fears, and the superintendent in reply asserted his superior knowledge to that of the plaintiff and assured him there was no danger, but promised to remedy the defect. In prosecuting such a work as the defendant was here conducting, persons are selected and employed with reference to the duties they are entrusted with. A superintendent is employed for his supposed superiority in ability, capacity, and experience to the common laborers who are under his supervision. He is supposed to inspire their trust and confidence; they are accustomed to obey his orders and to trust to his superior judgment. There presentations and promises of this superintendent were undoubtedly made to the plaintiff to induce him to continue his service and dispel his fears. Is it unreasonable to suppose that it did so? We think not. We are of the opinion that it was for the jury to say whether the defective appliances and precautions were such that it was negligent for the plaintiff to continue the service; and if, under all the circumstances, considering the promises and conduct of the superintendent, the plaintiff was not wanting in due care and caution in continuing,

then the defendant was not excused for the omission to perform its duty.

The appellant also complains of the refusal to give various of its requests to charge and to the modification of some. The charge given by the court was in accordance with the principles be-
147 fore stated. This court has held that it is not error to refuse to give instructions in themselves proper in the language they are requested if the court in its own language gives their substance, The requests, so far as they were proper, were substantially given. Indeed, the substance of most of the defendant's requests was given. The change made by the court in the giving of defendant's third request, in view of other portions of the charge given, was immaterial.

The defendant requested the court to charge as follows: "If you find that it was the course pursued in this instance by the defendant to carry on the business of mining while the walls and surroundings in the mine were unsafe and dangerous, and this fact was as known to the plaintiff, and that he also knew the character of the dangers there existing, and yet entered upon and continued in said service, he assumed the risk of such dangers and is not entitled to recover in this action."

This the court did not give, but did instruct the jury that under substantially such circumstances the defendant would not be liable unless there was an agreement to remedy the defect and provide necessary and proper protection, and that the plaintiff, relying upon such promises, continued his work, and this was all the defendant could properly ask.

The appellant asks that the judgment be reversed because
148 the damages were excessive, appearing to have been given under the influence of passion or prejudice. The argument is that the trial court having determined that the damages are excessive, it taints the whole verdict, and that none of it should stand. The practice which was pursued in this case is thoroughly established by precedent. (1st Sutherland on Damages, 813, 814, & 815, and cases there cited.) It is a supervision which courts exercise over verdicts for the protection of defendants in what are deemed to be proper cases, and if the rule is ever to be disturbed it should be on the application of parties injured and not those who are benefited by it. We are not prepared to say that the damages after the reduction are excessive, in view of the severe character of the injuries. The discretion of the trial judge in this respect, who saw the plaintiff personally and heard the testimony of all the witnesses, ought not to be disturbed unless it presents a plain case of the abuse of its exercise.

The judgment and order appealed from should be affirmed.

Zane, C. J., concurred.

Boreman, justice, concurred.

149 [Endorsed:] Supreme court, Territory of Utah. William C. Reddon, pl'ff & appellee, *vs.* The Union Pacific R. R. Co., def't and appellant. Opinion of court. Filed Oct. 1st, 1887. E. T. Sprague, clerk.

150 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between William C. Reddon, plaintiff and respondent, and The Union Pacific Railway Company, a corporation, defendant and appellant, manifest error hath happened, to the great damage of the said Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October, A. D. 1887, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, and the seal of the supreme court of
151 the Territory of Utah this 18th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal Supreme Court, Territory of Utah, United States of America.]

E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

152 [Endorsed:] In the Supreme Court United States. Original writ of error. Union Pacific R'y Co., pl'ff in error, *vs.* Wm. C. Reddon, def't in error. Filed 18th Oct., 1887. E. T. Sprague, clerk.

153 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Union Pacific Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of Utah Territory, this 18th day of October, A. D. 1887.

C. S. ZANE,
Chief Justice.

Copy of the foregoing citation was served upon me on this 18th day of October, A. D. 1887.

ARTHUR BROWN,
Attorney for William C. Reddon, Def't in Error.

[Endorsed:] Filed Oct. 18th, 1887. E. T. Sprague, clerk.

154 Know all men by these presents that we, John Sharp and Geo. Y. Wallace, both of the city and county of Salt Lake, in the Territory of Utah, are held and firmly bound unto William C. Reddon in the full and just sum of thirty thousand dollars ($30,000) to be paid to the said William C. Reddon, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a term of the supreme court of the Territory of Utah, in an action pending in said court on appeal from the district court for the third judicial district of said Territory, a judgment in favor of the said William C. Reddon, the plaintiff therein, and against The Union Pacific Railway Company, a corporation, the defendant, rendered and entered in said district court, was affirmed by said supreme court, and the said Union Pacific Railway Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the said judg-
155 ment, and a citation to the said William C. Reddon, citing and admonishing him to be and appear at a supreme court of the United States to be holden at Washington, District of Columbia, the fourth Monday of October, A. D. 1887:

Now, the condition of the above obligation is such that if the said Union Pacific Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN SHARP. [SEAL.]
GEO. Y. WALLACE. [SEAL.]

Sealed and delivered in presence of—
P. L. WILLIAMS.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Approved this 18th day of October, 1887.

C. S. ZANE, *C. J.*

Endorsed: Filed October 18th, 1887. E. T. Sprague, clerk.

156 *Assignment of Errors and Prayer for Reversal.*

In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
WILLIAM C. REDDON, Defendant in Error.

The said plaintiff in error assigns as error—

First.

That the damages given by the jury in said case were excessive and appear to have been given under the influence of passion and prejudice, and the said supreme court of Utah Territory erred in sustaining the decision and judgment of the said district court of the third judicial district of said Territory in holding the contrary thereof, and that the said judgment was not excessive.

Second.

The evidence in said action was insufficient to justify the verdict, in this, to wit: The said evidence failed to show it was the fault or negligence of the plaintiff in error (the defendant in said district court) which caused the injury complained of; and, further, the evidence does show that the defendant in error (the plaintiff in said district court), prior to and at the time of receiving the injury complained of, had full knowledge and information of the liability and tendency of the coal and other material to fall from the roof and walls of the
157 said mine and entry where he was working at the time of receiving said injury; and also that the said defendant in error was himself negligent in not testing the said coal and wall at the place of the accident before going to work there, or, if he did so test it and found it unsafe and dangerous, in going to work where he would be liable to be hurt on account of such unsafeness, and such negligence of defendant in error contributed to produce said injury complained of, and the said supreme court erred in sustaining the action and decision of said district court in holding the contrary thereof.

Third.

The said supreme court erred in sustaining the action of the said district court in overruling the objection of the plaintiff in error (the defendant in said district court) to the questions put to the defendant in error (the plaintiff in said district court) and other witnesses on his behalf touching the subject of the mine and entry not being timbered and relative to the stopping of the timbering in the entry in which the defendant in error (the plaintiff in said district court) was injured.

Fourth.

The said supreme court erred in sustaining the action of said district court in overruling the motion of the plaintiff in error (the defendant in said district court) for a judgment of nonsuit.

Fifth.

158 Said supreme court erred in sustaining the action of the said district court in giving the jury each of the said several instructions which it did give, as shown in the foregoing record, at the request of the defendant in error (the plaintiff in said district court), as shown in the above record.

Sixth.

The said supreme court erred in sustaining the action of said district court in refusing to give to the jury each of the instructions asked by the plaintiff in error (the defendant in said district court), and numbered one, two, three, four, five, six, and seven, respectively, in the form, language, and substance requested, and in changing and modifying each of the said instructions as shown in the foregoing record and giving them to the jury in said changed and modified form.

Seventh.

The said supreme court erred in sustaining the action of said district court in refusing to give to the jury each of the said instructions set forth in the foregoing record and asked by the plaintiff in error (the defendant in said district court), and numbered eight and nine, respectively.

Wherefore, in consideration of the said errors, the plaintiff in error prays this court for a judgment of reversal of the said judgment and decision of the said supreme court of Utah Territory, and that the said cause be remanded with the direction that such further action and proceedings be taken therein as may be in accordance with law.

P. L. WILLIAMS,
Attorney for the Plaintiff in Error.

[Endorsed:] Copy. Union Pacific R'y Co., pl'ff in error, *vs.* William C. Reddon, def't in error. Assignment of errors. Filed Oct. 18th, 1887. E. T. Sprague, clerk.

159 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of a writ of error hereto attached, do return, hereto annexed, a transcript of the record, the proceedings, the opinion, assignment of errors, and supersedeas bond, together with

the original citation and proof of service thereof, all in and of said court and the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory this the 17th day of March, A. D. 1888.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 349. The Union Pacific Railway Company, plaintiff in error, *vs.* William C. Reddon. Filed April 3rd, 1888.

APR 24 1891
JAMES F. JORDAN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 349.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM C. REDDON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
JEREMIAH M. WILSON,
For Plaintiff in Error.

C. G. BURGOYNE, WALKER AND CENTRE STS., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 349.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM C. REDDON.

Brief for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Statement of the Case.

This case comes to this Court on a writ of error to the Supreme Court of the Territory of Utah (Record, p. 115) to reverse the final judgment of that Court (Record, p. 107), which judgment affirmed the judgment of a district court of the Territory of Utah (Record, p. 3). The case was tried by a jury, who rendered a verdict for the plaintiff for $20,000 (Record, p. 3), for which amount judgment was at first entered. The defendant railway company moved the said district court for a new trial (Record, p. 4). This motion was heard by said

district court, and denied on condition that the plaintiff remit the damages given in the verdict in excess of $15,000, and that the judgment stand for only that amount; and this the plaintiff consented to do (Record, p. 105). Thereupon the defendant railway company appealed from the final judgment of the district court to the Supreme Court of the Territory (Record, p. 105.) The case was heard by the Supreme Court of the Territory upon what is called in the record (p. 5), a "statement on motion of said defendant for a new trial, and to be used as and constitute a statement on appeal from the final judgment in the said action." This statement was in reality and substance a bill of exceptions, and was duly allowed as such by the Judge of the trial court. (Record, p. 105). [This is sufficient as a bill of exceptions within the provisions of the Utah Code, 2 Comp. Laws of Utah (1888), § 3646, and within the rule in *Montana Railway Co. vs. Warren*, 137 U. S., 348; *Herbert vs. Butler*, 97 U. S., 319; and *Head vs. Hargrave*, 105 U. S., 45]. The Supreme Court of the Territory affirmed the final judgment of the district court, and a writ of error was sued out bringing the case to this Court, as above stated.

The Complaint (Record, p. 1) alleged in substance, that the defendant Railway Company was the owner of and was operating a coal mine, in which the plaintiff Reddon was employed by the Railway Company as a laborer and track-repairer; that the Railway Company, through its carelessness and negligence, allowed the roof and walls of said mine and its different rooms and apartments to become unsafe and insecure, and that the Railway Company well knew the unsafe and insecure condition thereof; and that while plaintiff Reddon

was at work in said mine, as such employee, and subject to and under the orders and directions of the superintendent or foreman thereof, without any fault or negligence on the part of said plaintiff, a large mass of coal fell from the roof and walls of said mine upon plaintiff, and injured him, for which injury the plaintiff demanded damages.

THE ANSWER (Record, p. 2), in substance, denied the allegations of negligence of the Railway Company, also denied that the plaintiff was injured, without fault or negligence on his part, as alleged in the complaint.

After the plaintiff's evidence was all in, the defendant moved the Court to grant a non suit. This motion was denied, and an exception was taken by defendant (Record, p. 55). The defendant also requested the trial Court to give certain instructions to the jury, which instructions were refused or given in a modified form, to which ruling also exceptions were duly taken (Record, p. 100). The Court also gave certain instructions, to the giving of which the defendant duly excepted (Record, pp. 98, 100).

Assignment of Errors.

* * * * * *

SECOND.

The evidence in said action was insufficient to justify the verdict in this, to wit: The said evidence failed to show it was the fault or negligence of the plaintiff in error (the defendant in said District Court) which caused the injury complained of; and, further, the evidence does show that the defendant in error (the plaintiff in said District Court), prior to and at the time of receiving the injury complained of, had full knowledge and information of the liability and tendency of the coal and other material to fall from the roof and walls of the said mine and entry where he was working at the time of receiving said injury; and also that the said defendant in error was himself negligent in not testing the said coal and wall at the place of the accident before going to work there, or, if he did so test it, and found it unsafe and dangerous, in going to work where he would be liable to be hurt on account of such unsafeness; and such negligence of defendant in error contributed to produce said injury complained of; and the said Supreme Court erred in sustaining the action and decision of said District Court in holding the contrary thereof.

* * * * * *

FOURTH.

The said Supreme Court erred in sustaining the action of said District Court in overruling the motion of the plaintiff in error (the defendant in said District Court), for a judgment of nonsuit.

FIFTH.

Said Supreme Court erred in sustaining the action of the said District Court in giving the jury each of the said several instructions which it did give, as shown in the record (pp. 98–99) as follows:

2. Where the defendant has been guilty of negligence causing the injury the right of the plaintiff to recover depends upon the facts. The question in such case is whether the injury was occasioned by the negligence or improper conduct of the defendant; second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution that but for such negligence and want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover.

4. If the jury find that the plaintiff was injured in consequence of the negligent condition of that part of the mine where the accident happened, and that that part was left after notice in such a condition as a careful employer would not have left it, and if you also find that the plaintiff was not guilty of contributory negligence, then the plaintiff is entitled to recover.

5. What contributory negligence is which will prevent the plaintiff from recovering must be determined by the jury according to the circumstances of the case in evidence.

6. If the jury find that the plaintiff acted with ordinary care and as an ordinarily prudent man would act in remaining in the employ of the defendant and in the manner of doing his work and with respect to the conditions at the time he received the injury, then the plaintiff is not guilty of such contributory negligence as will prevent his recovery in this case.

7. You are further charged, gentlemen of the jury, that the defendant was not the insurer of the safety of the plaintiff in its employ. It simply engaged to exercise ordinary care, to keep the mine and the workings in a reasonably safe condition, and if it failed to do so it is liable to the plaintiff for any injury which may have befallen him by reason of such failure while the plaintiff was engaged in the due course of his employment, provided that you believe from the evidence that the plaintiff at the time was free from fault or negligence on his own part.

If the jury find from the evidence that the entry in which the plaintiff was working at the time he was injured was unsafe and very dangerous, and that he,

prior to and at that time, knew or had the means of knowing that fact equally with the defendant, he cannot recover for such injury, although received by reason of such unsafe condition, unless you further find from the evidence that the plaintiff called the attention of the defendant's foreman to such danger or notified the defendant thereof, and the defendant, by its proper agent, assured the plaintiff that the danger would be remedied within a reasonable time, and the plaintiff relying thereon continued to work. What will constitute such reasonable time is to be determined by you from the circumstances and the character of the danger; and if a reasonable time had expired before the accident causing the injury took place the plaintiff had assumed the risk of the peril.

9. An employee must possess a fair measure of skill for the service he undertakes, and it is his duty to inform himself of the duties and dangers incident to his work. In going about his work he should do so with his eyes open and with a reasonable exercise of his faculties. He must not wait to be told to use care for his own safety, but must act affirmatively and use ordinary care to avoid dangers which are likely to beset him in his service. He is held by his contract of hiring to assume the risk of injuries from the ordinary and usual dangers of the employment.

11. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of, and found that it was not safe *and that the danger was imminent*, but still concluded it would not fall before he and his fellow-laborers could clean up the loose coal at that place, then the plaintiff cannot recover.

SIXTH.

The said Supreme Court erred in sustaining the action of said District Court in refusing to give to the jury each of the instructions asked by the plaintiff in error (the defendant in said District Court), in the form, language and substance requested, and in changing and modifying each of the said instructions as shown in the

record, and giving them to the jury in said changed and modified form (pp. 100-102) as follows:

1. *One who, by his own negligence, has brought an injury upon himself cannot recover damages for it. A plaintiff in such cases is entitled to no relief*, but where the defendant has been guilty of negligence also in the same connection the right of plaintiff to recover depends upon the facts. The question in such cases is, first, whether the injury was occasioned *entirely* by the negligence or improper conduct of the defendant; or, second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution on his part that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover.

2. Ordinary care implies the exercise of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight the care required to avoid it may be slight, but if the danger is extraordinary or imminent extraordinary and imminent care and vigilance should be used to avoid it, because such would be the natural course of a prudent person. The want of such care is negligence.

If, therefore, you find from the evidence that the plaintiff at the time of receiving the injury complained of knew or had the means of knowing the dangers of his situation and did not exercise that care and vigilance which were fairly required by the circumstances and his surroundings, and such omission on his part contributed to cause said injury, he is not entitled to recover in this action and your verdict should be for the defendant.

3. A master is never the insurer of the life or safety of his servant. He simply engages to exercise ordinary care in furnishing and keeping his machinery, appliances, structures, or workings, as the case may be, in a reasonably safe condition, and if he fails to do so he is liable to his servant for any injury which may befall him by reason of such failure while engaged in the due course of his employment, provided the serv-

ant is at the time *ignorant of such failure and has not, in the exercise of reasonable diligence, the means of knowing it*, and is also in that connection free from fault or negligence on his own part.

But if in any case there is a defect or unsafeness in the condition surrounding a servant while engaged in the business of his master, and this the servant knows or has the means and opportunity equally with his master of knowing, and without objection on his part, or, if he does object, still continues to work in such dangerous place without being influenced or induced to do so by reason or on account of the assurances or promises of his master that such defect or unsafeness shall be remedied within a reasonable time, he cannot recover for an injury received by reason thereof. If, therefore, the jury in this case find from the evidence that the entry in which the plaintiff was working at the time he was injured was unsafe and dangerous, and that he, prior to and at the time, knew or had the means of knowing that fact equally with the defendant, he cannot recover for such injury, although received by reason of such unsafe condition, unless you further find from the evidence that the plaintiff objected to continuing in said service on account of such dangers, but refrained from quitting it in consequence of assurances or promises on the part of the defendant that the danger should be remedied within a reasonable time. What will constitute such reasonable time is to be determined by you by the circumstances and character of the danger, and if such reasonable time had expired before the accident causing the injury took place the plaintiff had assumed the risk of the peril, and in that case your verdict should be for the defendant.

5. A servant or employee must possess a fair measure of skill for the service he undertakes and it is his duty to inform himself of the duties and dangers peculiar to his work. In going about his work he should do so with his eyes open and with a thoughtful exercise of his faculties.

He must not wait to be told to use care for his own safety, but must act affirmatively and use ordinary care to learn the dangers which are likely to beset him in his service. He is held by his contract of hiring to assume the risk of injury from the ordinary and usual dangers of the employment—*that is to say, from such*

dangers as are known to him or are discoverable by the exercise of ordinary care on his part and such as are incident to the work, though unknown and not discoverable.

And if in this case the jury find from the evidence that the injury complained of resulted from a danger incident to his employment in the coal mine of the defendant, and that such danger was either known to him or by the exercise of ordinary care on his part he could have discovered it, the defendant is not liable.

7. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe, but still concluded it would not fall before he and his fellow-laborers could clean up the loose coal at that place, then he must take the consequences of his mistaken judgment, and your verdict will be for the defendant.

SEVENTH.

The said Supreme Court erred in sustaining the action of said District Court in refusing to give to the jury each of the said instructions set forth in the record, and asked by the plaintiff in error (the defendant in said District Court), and numbered eight and nine respectively (Record, pp. 102–103):

8. Although the law, as a general rule in such cases as this, requires an employer to exercise due care in supplying safe structures and instrumentalities for his servant to work with, yet he is not obliged by the law to do this absolutely. If the servant knows it at the time he enters the service or afterward he becomes informed of the fact that such structures or instrumentalities are unsafe and dangerous, the employee having knowledge of his employer's habits and methods of conducting his business in this regard, and with such knowledge—upon or continuing in such service for the stipulated reward, cannot complain of such habits and methods or recover damages for an injury resulting therefrom; and if you find that it was the course pursued in this instance by the defendant to carry on the business of mining while the walls and surroundings in

the mine were unsafe and dangerous, and this fact was known to the plaintiff, and that he also knew the character of the dangers there existing and yet entered upon and continued in said service, he assumed the risk of such dangers and is not entitled to recover in this action.

9. In this case, to warrant a verdict for plaintiff, you must find by a preponderance of testimony that the injury was caused solely by the negligence of the defendant, and that there was no fault, negligence, or carelessness on the part of the plaintiff that contributed to said injury.

ARGUMENT.

I.

The trial court erred in not granting the motion for a nonsuit. Plaintiff's own testimony shows that the danger from falling coal was one of the risks of the employment in which he was engaged; also that he both entered upon the employment and continued in it with full knowlege of this danger. He, therefore, assumed the risk of injury from this cause, and cannot maintain an action therefor; and the Court should have instructed the jury to nonsuit the plaintiff, or to render a verdict for the defendant.

When the plaintiff had rested his case the defendant made the following motion (Record, pp. 54, 55).

"And now at the close of testimony on the part of said plaintiff, the defendant moves the Court for judg-

ment of nonsuit herein, for that the said plaintiff has failed to prove a sufficient case for the jury, and because the evidence introduced by him shows that he was himself guilty of negligence which contributed to cause the injury complained of."

This motion was refused and an exception duly taken. This ruling, among others, was assigned as error in the Supreme Court of the Territory (Record, p. 104), and was considered and decided on its merits by the Supreme Court of the Territory (see opinion of HENDERSON, J., Record, pp. 107, 110–113).

This assignment of error is now renewed in this Court. Under the statutes of Utah and the practice under those statutes, and the statutes of the United States applicable to the practice in this Court, this assignment of error may be considered in this Court. Sundry decisions of this Court to the effect that a *Circuit Court* of the United States has no power to order a compulsory nonsuit, and other decisions of this Court to the effect that the defendant by introducing evidence waives the ruling on the motion for a nonsuit, have no application under the statutes of Utah, and the practice thereunder governing the *Territorial* Courts. The cases in this Court are referred to in the brief on the other side at page 11, and the previous cases decided by this Court are cited in *Union Ins. Co. vs. Smith*, 124 U. S., 424. All of them are cases from *Circuit Courts* of the United States.

The Statutes of Utah (Vol. 2, Compiled Laws of Utah of 1888, page 277, Secs. 3343, 3344) expressly provide as follows:

"SEC. 3343, S. 455. An action may be dismissed or a judgment of nonsuit entered in the following cases:

"1. By the plaintiff himself at any time before trial,

upon the payment of costs, if a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the Clerk to the defendant, who may have his action thereon.

"2. By either party upon the written consent of the other.

"3. By the Court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

"4. By the Court, when upon the trial and before the final submission of the case the plaintiff abandons it.

"5. *By the Court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.* The dismissal mentioned in the first two subdivisions is made by an entry in the Clerk's register. Judgment may thereupon be entered accordingly.

"SEC. 3344, S. 456. In every case, other than those mentioned in the last section, *judgment must be rendered on the merits.*"

It thus appears, from this legislation, that in a case like the present if the motion for a nonsuit is granted judgment for the defendant must be rendered on the merits, thus making the same a final judgment.

That the right to insist upon the error by the trial Court in denying the motion for a nonsuit was not waived by the defendant afterwards introducing testimony on its own behalf, is placed beyond all question by the express provision of the Code of Procedure of Utah, which is as follows:

"§ 3652, S. 845. Upon an appeal from a judgment, the Court may review the verdict or decision, or any order if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken."

By reference to Section 3635 of the Utah Code it

will be seen that the decision of the Court upon the motion for a nonsuit was not "a decision or order from which an appeal might have been taken" from the District Court to the Supreme Court of the Territory. This decision denying the motion for a nonsuit was, therefore, reviewable by the Supreme Court of the Territory upon an appeal from the final judgment, and the right to insist upon the error in this respect was not waived by the defendant subsequently introducing testimony in its own behalf. Such is the well-understood practice in Utah and in the Code States, which have similar provisions.

See *Newton vs. Brown*, 1 Utah Rep., 287.
Goodspeed vs. Lead Works, 2 Utah Rep., 263, and authorities cited *infra*.

Wright vs. R. R. Company, 25 N. Y., 562, referred to *infra*, p. 21, is a case "on all fours" with the present as respects the right to review ruling on motion for nonsuit.

The motion made for a non-suit raised simply a question of law; namely, whether upon the plaintiff's testimony taken as true, with every inference that the jury could fairly draw from it, there was any liability on the part of the defendant. The Codes of the different States have provisions similar to those of the Code of Utah, and it is settled under them that, where a motion for a nonsuit is made and overruled and exception taken, the ruling is not waived by the defendant's proceeding to introduce evidence in support of his case, provided that evidence contains nothing to support the case as it was left by the plaintiff's evidence. The practice in the Code States having provisions of which

those of Utah are substantially a transcript is thus stated in Baylies' Trial Practice, pages 220 and 224:

"While a motion for a nonsuit should not be made in a case where the right is not reasonably clear, it should be made where there are no questions of fact for the jury, for a failure to move for a non-suit is an admission that the evidence on the part of the plaintiff is sufficient *prima facie* to justify a verdict in his favor (*Ross vs. Colby*, 3 Hun, 546); and in the absence of such motion or of a request that the Court directs a verdict, the defendant cannot be heard to allege on appeal that the verdict was without evidence (*Barrett vs. Third Ave. R. R. Co.*, 45 N. Y., 628, 632; *Sheeley vs. Cannon*, 17 Week. Dig., 159), or against the weight of evidence (*Sickels vs. Gillies*, 45 How., 94, and other cases cited).

"The plaintiff, if he has the affirmative, before he rests his case, must establish the truth of his averments by competent evidence, sufficient for that purpose, if uncontradicted (*Stearns vs. Field*, 90 N. Y., 640; see *Morrison vs. New York & New Haven R. R. Co.*, 32 Barb., 568, 575). If he fails to do this he has not made a *prima facie* case, and a motion for a nonsuit, or for the dismissal of the plaintiff's complaint, is proper. The Court may, notwithstanding, deny the motion and permit the plaintiff to give further proof (*Hunt vs. Mayhee*, 7 N. Y., 266, 273; see *Brown vs. Mayor, etc., of New York*, 55 How., 8). In such case the denial of the motion for the purpose of receiving further evidence, being in the discretion of the Court, is not a subject of exception. *But if the nonsuit is denied upon the ground that the plaintiff has made a prima facie case, an exception is proper* (see *Carpenter vs. Smith*, 10 Barb., 663, 665; *Tiffany vs. St. John*, 65 N. Y., 314)."

It thus appears that the motion for a nonsuit was a proper motion under the statutes of Utah, and an exception thereto a proper exception, and that the ruling on the motion for a nonsuit, if erroneous, is not waived by the defendant's introducing evidence, unless that evidence supplies the defects in the plaintiff's proofs, which in this case there can be no claim that it did.

That such is the understanding of the effect of the Code and the practice in Utah is also plainly inferable in this case from the fact that this assignment of error was considered at length on the merits by the Supreme Court of the Territory.

We notice that the attorney for the defendant, in error in his brief (page 11), makes the point that the introduction by the defendant as evidence was a waiver of the motion for a nonsuit, referring to three cases in 124, 120 and 106 U. S. These cases were originally tried in *Circuit Courts of the United States*, and subject to the rules of practice therein. They have no application to a case coming from a Territorial Court, in which the practice is prescribed and regulated by a Code of Civil Procedure. The early cases decided in this Court, that a compulsory nonsuit could not be granted in the courts of the United States, have reference only to cases in the Circuit Courts and District Courts of the United States, and do not and cannot refer to cases which come either from the *Territorial* or the *State* courts on writs of error. From the very necessity of the case, the sufficiency of errors duly presented in conformity with the provisions of the statutes relating to Territorial courts or proceedings in State courts, must be governed by the statutes of the particular Territory or State. Otherwise a case tried in conformity with the statutes, and exceptions taken in pursuance of the statutes, to which the parties must conform, are unavailable for the purposes of error in this Court; and thus this Court would be practically powerless to review any decision either of the State court or of the Territorial court, in all cases wherein the prac-

tice in the Circuit Courts of the United States or in this Court differs from the prescribed and regulated practice in the Territorial courts or the State courts.

We have referred to this matter at length to clear up the difficulties which may be suggested, and now proceed to discuss the question on the assumption that the ruling denying a nonsuit is available to the plaintiff in error provided that ruling can be shown to have been erroneous. The discussion under this point is useful also as showing our views of the testimony and of the legal principles applicable to it. But even if this ruling is not available to the plaintiff in error, we shall show hereafter that the questions thereby raised, as well as other questions, are presented by instructions given and refused.

The question in the present case, as to whether a nonsuit should have been granted at the close of plaintiff's testimony, depends for its decision upon the practice in the Territorial Courts of Utah. It is not at all a question of practice in the Federal Courts. Nevertheless, it is worth noting that precisely the same thing is accomplished in the Federal Courts by a direction of a verdict for the defendant in such a case. Note that, by the Code of Utah quoted above, a judgment on a nonsuit in such case as the present one would be a final judgment on the merits, the same as on a verdict directed for the defendant in a Federal Court.

The rule is well established in the Federal Courts that when the evidence given at the trial, with all the inferences that the jury may reasonably draw from it, is insufficient to support a verdict for the plaintiff, then the Court ought to direct a verdict for the defendant."

THIS COURT says:

"If, *after the plaintiff's case had been closed*, the Court had directed a verdict for the defendant, on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this Court."

MR. JUSTICE MATTHEWS in *Baylis vs. Travellers' Insurance Company*, 113 U. S., 320.

So, in another case, this Court says:

"It is the settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

MR. JUSTICE GRAY in *Randall vs. Baltimore and Ohio R. R., Co.*, 109 U. S., 482.

Again it says:

"It is the duty of a Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law."

"In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury, but conceding

to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the Court after the verdict to set it aside and grant a new trial. Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

Mr. Justice MILLER in *Pleasants vs. Fant*, 22 Wall., 121.

See, also,

Bowditch vs. Boston, 101 U. S., 16, 18.

Anderson County Commissioners vs. Beal, 113 U. S., 227, 241.

Littlefield vs. Improvement Fund Trustees, 117 U. S., 415, 419.

No. Penn. R. R. Co. vs. Commercial Bank, 123 U. S., 733.

THE LAW IS SETTLED IN ENGLAND to the same effect.

Lord CHELMSFORD *in Giblin vs. McMullen*, L. R., 2 P. C., 335.

See, also,

Wakelin vs. London and Southwestern Ry. Co., L. R., 12 App. Cas., 41.

Metropolitan Ry. Co. vs. Jackson, L. R., 3 App. Cas., 193.

Davey vs. London and Southwestern Ry Co., L. R., 11 Q. B. D., 213.

Same Case on Appeal, L. R., 12 Q. B. D., 70.

Ryder vs. Wombwell, L. R., 4 Ex., 32.

The testimony of plaintiff Reddon himself shows that the danger from falling coal was one of the risks of the employment in which he was engaged. His testimony shows that from the time when he first entered upon his employment in December, 1884, until May, 1885, when he was injured, the coal was from time to time falling from the walls or ribs and the roof of the mine, and particularly in the fifth entry of the mine in which the plaintiff was injured. His testimony shows also that this condition was regarded by himself and all the men employed in the mine as an incident to the work therein. His testimony also shows conclusively that he had full knowledge of the danger to be apprehended from the falling coal. We will not quote the testimony on these points here at length, but refer the Court to the parts of the record where it may be found. REDDON testified (Record, pp. 5–6) that he went to work in the mine December 1, 1884, clearing up the coal that had fallen in the fifth entry. He testified also (Record, p. 8) that he was engaged in clearing up the coal in this fifth entry for about a month and a half; and that during this time "*the rib was falling off more or less all the time*;" and that this was "*so all through the entry where he was clearing it up*," "*all the way in the entry.*" Reddon also testified (Record, p. 28) that during all the time, from December until May, coal was falling in that entry nearly every day at some place in the entry, and that he, as a "day man," was engaged in clearing up the loose coal that had fallen—the same work that he was doing when he was injured. He also testified (Record, p. 29) in regard to the fifth entry, "*there would generally be coal there every morning,*

having fallen from the ribs, so that it was usual to remove more or less coal every day, and that this was the condition during all this period from the time that he went there in December up to the time of the accident, continuously." The testimony of the plaintiff Reddon also shows that he both entered upon the employment and continued in it with full knowledge of the danger. He testified (Record, p. 11) that **"it was what I considered dangerous—falling more or less all the time. I considered it dangerous myself;** that "*coal kept falling on the entry from the rib—on the fifth entry; that was the most; that was considered to be the dangerousest entry in the mine. So considered by myself and miners.*"

It is unnecessary to refer at greater length to the testimony of plaintiff Reddon. The whole of his testimony shows conclusively that he had full and complete knowledge of the dangerous character of the mine, and particularly of the fifth entry of the mine; that he went to work there knowing the dangers incident to his employment; that it was a part of his duty as a day man to load up or clear up the loose coal that had fallen; that he was hired, among other things, *for this very purpose;* and that it was while he was engaged in doing just this very work for which he had been expressly hired, and which he had agreed to do notwithstanding he had full knowledge of the dangers of the employment, that he received the injury for which he brought this action to recover damages. The testimony of plaintiff Reddon also shows that, knowing all the dangers from falling coal, and knowing the usual methods of testing to see whether coal was likely to fall (Record, p. 31), he began his work at the

time and place where he was injured without making any test to see whether coal was likely to fall (Record, p. 35, top).

It is elementary law that under such circumstances plaintiff cannot recover; and that inasmuch as these facts were disclosed by his own testimony, which thus showed affirmatively that he had no cause of action, the Court should have instructed the jury to nonsuit the plaintiff or to render a verdict for the defendant. It is unnecessary to cite authorities to this Court to show that one who enters upon a dangerous employment voluntarily, knowing all the facts, assumes the risks of such dangerous employment. We print here, however, a few such authorities, and more will be found to the same effect in other parts of this brief.

A case directly in point, both as to the practice on the question of nonsuit, and as to the facts and questions of substantive law, is *Wright vs. New York Central Railroad Company*, 25 N. Y., 562. The action was for damages resulting from a collision between two of defendant's trains. Plaintiff claimed that the injury was occasioned by the negligence of the defendant in employing an incompetent engineer, also in arranging the time-tables so that the trains would meet at the same time at Pekin. When the plaintiff rested his case the defendant moved for a nonsuit on the ground, among others:

"4. That if there were any defects in the time-table calculated to work injuriously the defect in this case was cured by the specific instructions to the engineer and *by the engineer's own knowledge of the facts.*"

The motion was denied and defendant excepted. The defendant afterwards introduced evidence on its own

behalf (p. 563). Verdict and judgment for plaintiff. The judgment was affirmed by the General Term, and the defendant appealed to the Court of Appeals. The Court of Appeals reversed the judgment of the lower Court and ordered a new trial. In giving the opinion the Court made a careful statement of the settled principles of the law as to liability of master to servant, stating, among other things, the following:

ALLEN, J.: "Certain principles touching the liability of the master to the servant, for injuries sustained by the latter in the course of his employment, have, by the decisions in this State and several of the sister States, as well as in England, become so well settled that they need only to be stated. They cannot be disturbed, neither can their authority be disregarded. * * *

"5. If the servant sustaining an injury through the unskillfulness or insufficiency in numbers or otherwise of his fellow laborers, or defects in the machinery or conveniences furnished by his employer, *has the same knowledge or means of knowledge of the unskillfulness and deficiencies referred to as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment*, incurred, as they were, by the want of skill and incompetency of those employed with him or the defective machinery used in the work" (citing cases).

The Court also say (p. 568):

"Applying these principles to the case in hand, the plaintiff should have been nonsuited. The verdict and judgment were rendered in the Court below mainly upon the ground that the defendants, by the improper regulation of their trains and the times and manner of their passing each other at the point of the collision, had directly and by personal, so to speak, and direct interference caused the collision and consequent injury to the plaintiff. But, a little consideration will show the fallacy of this.

* * * * * *

But again, the plaintiff, as appears by his own testimony, had been serving on this same train as brake-

man, and under the same running regulations for several weeks, and was familiar with the arrangements for the passing of the trains at Pekin, the point of collision. *He knew the perils of the service, and consented to continue in it, and has no claims upon his employer in respect to injuries resulting from these perils. He knew, as well as the directors or the defendant could know, the dangers of a collision at ekin, under the running regulations which had been in force several weeks before the injury. He therefore voluntarily assumed the risks and must bear the loss consequent upon them"* (citing cases).

Gibson vs. Erie Railway Co., 63 N. Y., 449, is also a case in point. Plaintiff's intestate was a freight conductor in defendant's employ. While climbing to the top of a car by the ladder at the side, he was struck by the projecting roof of a depot and killed. The roof had been in the condition it then was for twenty years. The deceased had been in the employ of the defendant for seven years, passed over the road daily, and knew the condition of the roof and its proximity to the passing trains. At the close of plaintiff's evidence defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of defendant had been shown, and that the evidence showed negligence on the part of the deceased. The motion was denied and exception taken. A verdict was had and judgment rendered in favor of plaintiff. The Court of Appeals reversed the judgment and ordered a new trial on the ground that plaintiff's intestate knew of the character and position of the roof which caused his death. Note that the case was not one where a *temporary* danger arose after the plaintiff's intestate entered upon his employment, but where a danger existed of which he knew at the time when he entered upon the employment. The case is in this respect like the pres-

ent one. In giving the opinion of the Court in that case, ALLEN, J., says (p. 452):

"When the deceased entered the employment of the defendant he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and the property of the defendant as it then was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structures from which the employees might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or in case of injury from risks which were apparent, he could not call upon his employer for indemnity. Lord Chief-Justice COCKBURN, in *Clarke vs. Holmes* (7 H. & N., 937), says: 'No doubt, when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment.' It is not necessary to hold that this rule should be applied in all its rigor to casualties arising from the use of complex and dangerous machinery, the condition of which, or the risks involved in different conditions of it, an ordinary workman might be incapable of judging. But here the structure was permanent in its character, and the risks resulting from its location were as apparent to the ordinary laborer as to a skilled mechanic or expert. They were visible to all, and could be as well appreciated by the deceased, who had for many years resided at the place of the injury, as by the officers and agents of the company. He took service subject to all risks incident to the position and mode of construction of the station-house, and if the defendant did nothing after the employment to aggravate the danger, there was no liability. The evidence does not show that there was any change in the building or in the road after the deceased entered the service of the defendant (*Seymour vs. Maddox*, 16 Ad. & El., 327). It is said by ELLSWORTH, J., in *Hay-*

den vs. Smithville Manuf. Co. (29 Conn., 548) that 'every manufacturer has the right to choose the machinery to be used in his business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, or navigate an old or new vessel. The employee, having knowledge of the circumstances and entering service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service.'"

Clark vs. St Paul & Sioux City R. R. Co., 28 Minn., 128, was a case almost exactly like *Gibson vs. Erie Railway Company*, 63 N. Y., 449. A servant was injured by coming in contact with a roof or awning projecting from the side of an elevator over a side track, upon which the servant was engaged in moving freight cars. The servant knew of the existence and nature of the danger. The Court say (p. 130):

"It is well settled in the Courts of this country and of England that, if a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injury. These views are maintained in the following cases" (citing them).

See, also,

Devitt vs. Pacific Railroad, 50 Mo., 302.
Foley vs. C. & N. Ry. Co., 48 Mich., 622.

A case in point is *Kielley vs. Belcher Silver Mining Co.*, 3 Sawyer, 500. The action was against the owner of a mine for injuries sustained in the mine through the negligence of a fellow-workman in setting off a blast without giving sufficient notice to the plaintiff. At the close of plaintiff's testimony defendant's counsel moved the Court to direct the jury to find a verdict for the defendant upon the ground that the evidence, taken as true and most strongly in favor of plaintiff, would not justify a verdict in his favor. The Court directed a verdict in favor of defendant. SAWYER, J., giving the opinion of the Court said (p. 503):

"But still, we shall assume—and there is some plausibility in the point—that there is something in it broader than the negligence of Webber and Glenn; that it was the duty of the company to make other regulations, additional and further regulations, for affording means of notice other than those that were ordinarily adopted in this mine. Then we come to this position; the plaintiff, upon his own testimony—for we must take his own testimony as he gives it—and taking it in the light most favorable to himself, upon his own showing, knew the mode in which this ore was loosened; that it was by blasting. He had at times been engaged in blasting himself; he was wheeling ore out after the blasts. In this particular case he knew that the ore, if there was any there, on the twelfth floor, was the result of a blast. He said that he supposed that the blast had already gone off, from the fact of their being ore there; but he knew that the mode of preparing the ore for its reception in the wheelbarrow was by blasting. He knew, because he tells us so, what the customary mode of notifying parties of an impending blast was, and that was by calling out 'fire.' This he understood to be the customary mode. He knew, according to his own statement, that no other precautions were taken; he knew that no lights were placed at the point of the contemplated blast, and he knew that no bells were placed in the cooling room, because that was a matter of conversation between him and his co-laborers. He knew the

number of men that were provided to notify those approaching, as it was also a matter of conversation between them; that the means of notification were insufficient, and it was suggested, among other things, that bells might be arranged in the cooling room to give notice of the coming blast. Now, having knowledge of all these matters, he still does not seem to have complained to the defendant, but having that knowledge, and knowing the only means that were ordinarily taken to give notice of a blast, and knowing that those were insufficient to obviate all danger, he still continued in that employment. He had no reason to expect that any other notice would be given. He knew that no other was usually given, and that it was insufficient, and, under the authorities, we think that he went on with the business and assumed the risks which he knew attended it. It was not a matter of ignorance with him. In fact, he knew the means afforded for giving notice of danger, and beyond these he assumed himself the responsibility of guarding himself against the dangers resulting from the blasting. We think it is entirely and clearly within the case of *McGlynn vs. Brodie*, 31 Cal., 376, and the cases there cited. This is not a matter of general reputation for neglect on the part of defendant, as claimed by counsel for the plaintiff—general reputation for carelessness. It was a knowledge of the actual mode of doing this particular business in this particular mine. He knew where they were blasting, according to his own testimony. He knew the mode of their taking the ore out; he knew in what the danger consisted; he knew that there was a blast liable to be set off at any time. He had been engaged in this work for a long time, engaged in that employment some months; and it was with reference to this subject of blasting that the discussion took place in regard to placing signal bells in the cooling-room, to which they resorted in their daily work, and having reference to the blasting that was done as a means of loosening the ore which he himself was wheeling out. It was, therefore, a special knowledge in regard to this particular matter, and not a general reputation, not a general report, but knowledge of the precise circumstances under which he was working, and of the danger to which he was subject. It was with that knowledge, and with the full knowledge of the only

means that were taken to advise him of impending danger, and that he had no reason to expect any other warning, he went on with his work, and, we think, under the law, he assumed the risk, assumed to take such precautions himself to ascertain when a blast was going off as were necessary beyond those which were customary in that mine, and which he knew to be customary. We think, therefore, it is within the case referred to, and the authorities do not seem to be conflicting upon that point; they seem to be all one way, so far as they have been called to our attention, none Seem to conflict with the case of *McGlynn vs. Brodie*, and the cases there cited.

Then, taking the facts as stated by plaintiff himself, taking them in the strongest light in his own favor, we do not think he has made out a case that would justify us in giving it to the jury. We think, upon these points, that if the jury should find against the defendant in this case, the Court would be compelled to set aside the verdict for want of evidence to support it. The motion, therefore, must be granted."

The testimony of plaintiff Reddon fails to show that he notified the foreman Thomas of any danger at the place where Reddon was injured; much less that the foreman Thomas promised to remove any danger at that place.

It will not, we apprehend, be contended by the counsel for defendant in error, Reddon, that the danger in the mine or in the fifth entry of the mine, *generally*, from falling coal was not one of the risks of the employment upon which Reddon entered and in which he was engaged at the time when he was injured. The theory which we suppose the counsel for defendant will urge is that the plaintiff Reddon informed the foreman of the mine, Thomas, that there was some *special* danger from coal falling *at the particular place where*

Reddon was afterwards injured, and that the foreman Thomas promised that this danger should be removed. This was the theory upon which alone the Supreme Court of the Territory affirmed the judgment of the Court below (Record, p. 113). This theory, however, proceeds from a clear mistake as to the facts made by the Supreme Court of the Territory, which mistake, however, was not made by the trial Court. The trial Court said (Record, p. 55):

"I don't understand that the evidence shows that the plaintiff in this case discovered that this particular piece of coal that fell, or the coal that was on the roof or on the walls near him, was dangerous *at that particular place:* that there was any imminent danger from that coal falling at that particular place. I don't understand that."

The *trial* Court in refusing the motion for a nonsuit proceeded entirely upon the theory of the *general* negligence of the defendant in failing to keep the mine or the fifth entry of the mine *generally* free from danger from falling coal. The trial Court thus clearly failed to recognize what testimony of plaintiff Reddon himself conclusively showed, namely, that the danger from falling coal was one of the incidents of his employment, and was a danger which had existed continuously during all the time of his employment; and the trial Court failed to apply the rule of law that in such case the plaintiff, having voluntarily assumed the risks of his employment, cannot recover damages for an injury caused thereby. The fact that the mine, and particularly the fifth entry of the mine, were dangerous at the time of the accident, and that the foreman Thomas knew them to be so, would not create any liability on

the part of defendant; for the plaintiff Reddon knew equally well that they were dangerous, and that this danger was one of the incidents of the employment as it was actually carried on by the defendant. It does not make any difference that the employment *might have been* carried on in a more safe manner; the only question is, Did the plaintiff Reddon know that as the business *was actually carried on* there was danger from falling coal? If he did know this fact—and his own testimony shows conclusively that he did—then by voluntarily engaging in the employment he assumed the risk of injury from falling coal as one of the risks incident to the employment. It is not true that an employer is always liable if he fails to keep his premises in a reasonably safe condition; he is not liable in such a case if the employee knows the condition in which the premises are kept and the danger to be apprehended therefrom. And this is true, however negligently the premises may be kept. (See the authorities on this point, p. 47–50, 21–28, 33–37.)

Therefore, unless the attention of the foreman, Thomas, was called to the very danger from which Reddon was injured, and unless he promised to remove it, and thereby induced Reddon to continue in the employment, the defendant is not liable in this action. This, we proceed to show, was not the fact.

The testimony of the plaintiff, Reddon, clearly shows that the attention of the foreman, Thomas, had never been called to the danger from falling coal at the place where Reddon was injured, much less that he had ever promised to remove such danger. His testimony (Record, p. 13) showed, or tended to show, that about a week before he was hurt he called the attention of

the foreman, Thomas, to the dangerous condition of *certain parts* of the fifth entry. This was done under the following circumstances (Record, p. 29): One day when the plaintiff, Reddon, was working in the fifth entry and the foreman happened to come through the entry, the plaintiff, Reddon, called his attention to the danger that coal would fall in certain parts of the entry. At this time when Reddon called the foreman's attention to the danger, as Reddon himself testified, *they were not near the place where Reddon was afterwards injured, but a "considerable distance further away from the slope"* (Record, p. 30, 32). From this place where Reddon first called Thomas' attention to the danger, Reddon walked along with Thomas in the entry *further away from the slope*, and called his attention to the danger from coal falling in *that part of the entry* (Record, pp. 30, 32). *There is not a particle of evidence to show that Reddon ever called the foreman's attention to any danger from falling coal at or near the place where Reddon was hurt*, much less that the foreman ever promised to remove such danger. The danger at that particular place was only the ordinary danger incident to the employment, a danger to which the foreman's attention was never called, and which he never promised to remove. The whole theory, therefore, upon which the Supreme Court of the Territory affirmed the judgment of the Court below, is based upon an entire mistake of the facts, as shown by plaintiff's own testimony—a mistake, as we have shown above, that was not made by the trial Court. The trial Court adopted the same view of the evidence that we here present, and this view is conclusive against any claim of the plaintiff, Reddon, to recover

on the theory that the foreman's attention had been called to the particular danger, and that he had promised to remove it—such, we have seen, was not the fact, as shown by the plaintiff's own testimony.

The decision of the trial Court below proceeded upon the *erroneous notion that the defendant was bound to keep the mine in a safe condition;* and was liable for any injury which might result from its failure so to do. This was a clear mistake of the facts and of the law applicable thereto. The defendant had a right to conduct its business *in any way it chose*, and so long as an employee had full knowledge of the way in which the business was conducted and of the dangers to which he exposed himself by engaging in the employment or continuing therein, he assumed the risk, and can maintain no action for an injury therefrom. *There was no evidence that the condition of that part of the fifth entry where Reddon was injured was any different when Reddon was injured from what it had been during all the time that Reddon had been employed in the mine;* and, as we have shown (*supra*, p. 20), Reddon had full and complete knowledge of the general danger from falling coal.

The law is clear, as the authorities on this brief show, that upon such evidence for plaintiff the Court should have non-suited the plaintiff.

THERE IS A WIDE AND WELL RECOGNIZED DISTINCTION between cases in which, like the present, there was a dangerous instrument or a dangerous place which was *permanent*, and incident to the employment, and cases in which there has arisen a danger which was only *temporary* and not incident to the employment. In the

former cases, and in cases like the present one, the mere fact that the servant gives notice of the danger to the master is not sufficient to render the master liable for any injury that may result to the servant by reason of such danger. The master is under no obligation to remove the danger in such case. While in the latter case, where temporary danger has arisen, and the servant has given notice of the danger to the master, the master is under obligation to remove the danger; and, in the event of his failure so to do, will be liable for any injury which the servant may suffer by reason of such failure. The reason for the difference in the two classes of cases is obvious. When a servant enters upon an employment which he knows is dangerous, he thereby assumes all the risk incident to the employment, and cannot call upon the master to remove them or hold him liable for any injury resulting from a failure so to do. The contract of service in such case contemplates that the servant shall assume the risks from the permanent dangers of the employment. In the other class of cases, where a temporary and unexpected danger has arisen, such danger was clearly not contemplated by the contract of service. It is in these classes of cases that a master is held liable where the servant has informed him of the danger and the master has thereupon promised, within a reasonable time, to remove the danger, and the servant has afterwards been injured by reason of the master's failure so to do. The authorities carefully distinguish between these two classes of cases.

In *Clarke vs. Holmes*, 7 H. & N., 937, COCKBURN, C. J., giving the opinion, said (p. 943):

"I consider the doctrine laid down by the House of Lords in the case of *The Bartonshill Coal Co. vs. Reid* as the law of Scotland with reference to the duty of the master, as applicable to the law of England also, namely, that where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur. *No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from want of proper repair, and with knowledge of the fact enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment.* The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept.

"In the present case *at the time the plaintiff entered in the employment*, the machinery was properly fenced; on its ceasing to be so, the manager of the works, on the remonstrance of the plaintiff, promised in the presence of the defendant, the master, that the defect should be made good. It must be taken, therefore, that, at the time the contract between the plaintiff and defendant was entered into, it was contemplated by the parties that the machinery should be fenced. It follows that, through the negligence of the master in omitting to keep the machinery fenced, the servant has been exposed to danger to which he ought not to have been subjected, and the injury of which plaintiff complains having thus arisen, the defendant is justly and properly liable.

"It was, indeed, strongly urged upon us, on the part of the defendant, that, as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowl-

edge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is, therefore, in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that, is *a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery* and that of one who, on a *temporary* defect arising, is induced by the master, after the defect is brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case, it seems to me, that the servant by no means waives his right to hold the master responsible for any injury that may arise to him from the omission of the master to fulfill his obligation."

In *Manufacturing Company vs. Morrissey*, 40 Ohio St., 148, the Court recognize this distinction. Citing *Clarke vs. Holmes*, 7 H. & N., 937, the Court say (p. 153):

"Chief-Justice COCKBURN, in delivering his opinion, very forcibly draws a distinction between the case of an employee who knowingly enters into an engagement to work on defective machinery, and that of him, who in the course of his employment discovers its defective condition, but is induced to remain in the same service by the master promising him to remedy the defect."

In *Laning vs. New York Central R. R. Co.*, 49 N. Y., 536, the facts were as follows: The defendant had in its employ as a foreman over certain work a man who at the time when he was hired was competent for the employment, but subsequently become incompetent by reason of drunkenness. This fact was known to the plaintiff. The foreman directed certain incompetent and unskillful workmen to erect a scaffold, and the plaintiff by direction of the foreman went upon that scaffold, and as a result of its imperfect construction was

injured. At the trial when the plaintiff rested his case the defendant moved that the plaintiff be nonsuited on the ground of contributory negligence. The Court denied the motion. A verdict was had, and judgment was rendered in favor of plaintiff. The Court of Appeals affirmed this judgment, holding that the question of contributory negligence was properly for the jury; but the Court took care to distinguish the case from *Holmes vs. Clarke*, 10 W. R., 405; s. c., 7 H. & N., 937. The same difference in the facts also distinguish the case from the present one. The Court of Appeals in *Laning vs. R. R. Co., supra*, said (p. 536):

"It has been held that there is a formal distinction between the case of a servant who knowingly enters into a contract to work upon defective machinery and that of one who on a *temporary* defect arising is induced by the master after the defect has been brought to the knowledge of the latter should continue to perform his service under a promise that the defect would be remedied (citing *Holmes vs. Clarke*, 10 W. R., 405; s. c., 7 H. & N., 937).

THE FACT THAT THE FOREMAN THOMAS DIRECTED REDDON to go to work loading up loose coal at the place where he was injured does not aid the plaintiff's case or render the defendant liable. What the foreman ordered Reddon to do was only an ordinary service in the course of and part of his employment. He was a "day man" (Record, p. 5), and was hired expressly for the purpose, among other things, of doing just what he was doing when he was injured.

In *Davis vs. R. R. Co.*, 20 Mich., 105, COOLEY, J., says (p. 127):

"In the case of *Railroad Co. vs. Love*, 10 Ind., 556, the Court say that where both parties have equal

knowledge, *and the servant continues in the service*, the true rule of decision is that each party takes the risk, unless the employer undertakes to give special directions. The same rule was recognized in *Thayer vs. Railroad Co.*, 22 Ind., 29, and in numerous other cases which we need not quote from here (citing cases).

"It is sought, however, to bring this case within the principle indicated in *Railroad Co. vs. Love*, 10 Ind., 556, and others like it, by showing that, in fact, in this case, the defendants, through the plaintiff's superior officer, Mr. Walden, did give special directions, and subjected plaintiff to special risk by ordering him in this instance to take the pony engine and perform the duty, in attempting to discharge which the accident occurred. But there is no foundation for this argument. What the plaintiff was directed to do was only an ordinary service, such as the employment contemplated, and such as he was performing from hour to hour. It was not something apart from his ordinary occupation under his employment, and which for that reason he could not be supposed to have contemplated the risk of, nor was the direction to perform it 'special direction' in the sense of pointing out anything unusual to be done by him."

The testimony for plaintiff Reddon fails to show that the foreman Thomas made any promise whatever to remove any danger from falling coal in that part of the fifth entry where Reddon was injured—his attention was not, as we have shown above, called to any danger at that place; and, further, upon any fair construction of the testimony for plaintiff, the foreman Thomas did not promise to remove within a reasonable time the danger from falling coal in those parts of the entry to which his attention was called.

The only testimony on this point was the following:

Plaintiff REDDON testified (Record, p. 14): "I took him and told him this coal was going to fall if it was not taken down. I was afeared and took him along the road all the way in; sounded the coal for him until I got him to the room where Locke worked—John Locke—and that was the dangerousest place there was between his rib and the next one; and he says, 'Bill,' he says, 'that won't fall yet. You have no idea how this coal will hang;' and he says, 'I can't stop the turn to take it down now, but,' says he, 'I will take it down some other time.' Them was just the words that was used, as near as I can get at it." "He didn't say nothing, only as I told you. He said he could not stop the turn then to take it down; that he would take it down some other time—have it taken down. He didn't take it himself, of course. Yes, sir; he would have it taken down. He didn't work his own self."

JOHN LAWRENCE testified for plaintiff (Deposition, Record, p. 40): "Tom Thomas', the superintendent's, attention was so called. Mr. Reddon, the plaintiff in this case, called Mr. Thomas' attention to the fact that this was unsafe. Mr. Thomas' reply was that if he, Mr. Reddon, was to take down that coal it would cause too much delay to the cars running out and in, and wound up by saying, '*Hell, there is no danger, anyway*,' or words to that effect."

The plaintiff's testimony shows, as we have pointed out (*supra*, page 31), that the danger to which the plaintiff Reddon called the foreman's attention was at a considerable distance from the place where Reddon was injured. The foreman therefore in making the statement or promise just quoted did not refer to or promise to remove any danger at the place where Reddon was injured. The plaintiff Reddon therefore did not go to work or continue to work in that place, relying upon any promise or assurance that any danger there existing would be removed. There was there-

fore no promise of the foreman to remove any danger at that place, and the refusal of the Court to nonsuit the plaintiff because of such alleged promise was error.

Further, upon any fair construction of the testimony for plaintiff above quoted, the foreman Thomas did not promise to remove within a reasonable time any danger *in any part* of the fifth entry. His answer to the plaintiff Reddon was rather a refusal to remove the danger. Instead of saying that he knew the place was dangerous, he said: "*Bill, that won't fall yet. You have no idea how this coal will hang. I can't stop the turn to take it down now.*" If this had been all that the foreman said, there would be no doubt that it was a refusal to remove the alleged danger. What follows, namely, "I will take it down some other time," are the only words upon which the plaintiff may rely as showing any promise to remove the danger within a reasonable time. But these words, we submit, are totally inadequate to constitute any such promise. The whole sum and substance of the foreman's remarks were that it was not dangerous, and that he would not take it down then. The additional statement that he would take it down "some other time" cannot be relied upon as showing a promise to remove the danger within a reasonable time.

The promise—if such words constitute a promise—was wholly indefinite. The foreman did not state when he would have the coal taken down (Record, p. 38, top), or even, generally, that he would have it taken down within a reasonable time. The answer was merely "some other time." We submit that such an answer is not a promise to have the coal taken down within a

reasonable time. The situation is as follows: Reddon tells the foreman that there is a certain danger; the foreman answers, "No, there is no danger; I will not remove what you think is danger now—*some other time*." Can any reasonable man infer from such an answer that the foreman promises to remove the danger within a reasonable time? Most certainly not. He does not even admit there is any danger—much less does he promise to remove it within a reasonable time. That this view is the correct one, and that this was the meaning conveyed by the words of the foreman, and that it was so understood at the time, is evident further from the testimony of John Lawrence, above quoted, to the effect that "if the coal was to be taken down it would cause too much delay to the cars running out and in, and the statement of the foreman 'hell, *there is no danger any way*,' or words to that effect."

The following case clearly shows the distinction between a distinct promise to repair within a reasonable time or within a fixed time, on one hand and an indefinite promise to have the matters complained of repaired or remedied at "some time." The promise in the first case, if it is made for the purpose of inducing the servant to continue his work, and is the means of inducing him to continue in it, may render the master liable in case of injury. A promise or statement to repair at "some time" is so indefinite that the servant is not justified in relying upon it, and the master will not be liable in case of an injury suffered after a promise is made. It is the latter kind of promise or statement which, on the plaintiff's own showing in the case at bar, is the only thing relied on to create a liability, and the only thing on which the judgment of the Su-

preme Court of the Territory proceeded. The case referred to as illustrating this distinction is that of *Marquette, Houghton and Ontonagon R. R. Co. vs. Spear*, 44 Mich., 169 (1880), decided by a Court of great ability, and the opinion is given by a Judge of great eminence and of great familiarity with the law of negligence.

Plaintiffs owned a warehouse, with a branch track connecting with defendant's railway, and employed defendant to draw cars upon that track for their accomodation. The engine thus used emitted sparks; the plaintiffs complained of this to the defendant. The sparks set fire to the warehouse; and plaintiffs brought suit for negligence. The further facts are stated by Judge COOLEY in the opinion as follows (fol. 243):

"The witness had called the attention of the train dispatcher of the railroad company to the dangerous condition of the engine that season and the season before, *and he said he would see it fixed*. Plaintiffs had always had trouble with it, and were afraid of it, because of its throwing sparks. The train dispatcher kept putting off the fixing; said '*it would be fixed some time*.' Nevertheless plaintiffs continued to employ from day to day this dangerous implement, until such a calamity as they had feared actually occurred.

"It seems almost unnecessary to do more than recite this evidence in order to dispose of the case. Instead of showing a cause of action, it effectually disposes the existence of one. * * * That which one consents to and invites he cannot complain of in law as an injury.

"But it is argued that the company promised to repair the engine, and the plaintiff had a right to rely upon this being done. The promise was to repair 'sometime;' and meantime the instrument was being employed by plaintiff from day to day with knowledge that the repairs were not made. *When there is a promise to repair* IMMEDIATELY, OR WITHIN A FIXED TIME, *and a party relies upon its having been done, and is injured because of such reliance, he has a right to com-*

plain; but this is not such case. The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. He knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risk of what actually happened. Judgment reversed."

Whatever may have been the meaning of the conversation between the plaintiff Reddon and the foreman Thomas, it is clear that Reddon, by voluntarily continuing to work in the fifth entry for at least a week after he had the conversation with the foreman in regard to the danger from coal falling in that entry, during which time as, Reddon well knew, the coal was falling there daily, he thereby waived any right to insist that the foreman was negligent in not removing the coal or to any claim for damages arising from such alleged neglect.

The plaintiff Reddon himself testified (Record, p. 28): "*I only spoke to him* (foreman Thomas) *once. I think it was about a week before I got hurt; and during all that time the coal in the entry was falling every now and then. Nearly every day. I was familiar with that fact.*"

There was no testimony to show, or tending to show, that Reddon ever objected to working in the mine or in the fifth entry of the mine on account of the danger; nor was there any testimony to show that he refrained from abandoning the service because of the danger; nor that

any promise or representation was ever made to him for the purpose of inducing him to continue in the service. The testimony all goes to show that Reddon regarded the danger from falling coal as an incident to his employment. The rule that, where a master has expressly promised to repair a defect a servant can recover for an injury caused within such a period after the promise as it would be reasonable to allow for this purpose, always has, as a condition to its application, the further rule that *the promise must have been the inducement for the servant to continue in the service* (see on this point *Hough vs. Railway Co.*, 100 U. S., 225; Cooley on Torts, p. 559; and Cases, *supra*, in this brief). Such was clearly not the fact in the present case. There was absolutely no testimony whatever tending to show that Reddon was induced to remain in the service by any promise made by the foreman Thomas.

The trial Court refused the motion for a nonsuit (Record, p. 55) partly on the theory that there was some testimony to go to the jury tending to show that the defendant was guilty of negligence in stopping the timbering and in not having sufficient tests made to discover loose coal that was likely to fall. But there was no testimony whatever to show, or tending to show, that there was any failure on the part of the company to make such tests in the fifth entry of the mine as were usually made, whatever these may have been. There is nothing in the testimony for plaintiff to show any negligence of the master in this respect. For all that appears, the coal fell *in spite* of the usual tests and precautions having been taken.

It is clear that there was no negligence of the defendant in the failure to timber, so far as the plaintiff Red-

don was concerned. It was part of his employment, upon which he voluntarily entered and in which he continued, *to work where timbering had not been done.* For the first month and a half that he was in the mine he worked clearing up the fifth entry (Record, pp. 6–8). "All the time this work of clearing up in that entry necessarily had to be carried on ahead of the timbering" (Record, p. 25). This was the regular course of business in the mine. The clearing up of this coal before timbering was a part of his duty as a "day man" (Record, p. 12). This timbering, therefore, would not necessarily have furnished any protection to the plaintiff Reddon, and any alleged omission to timber could not be negligence as respects him.

II.

The trial Court erred in its instructions to the jury and its refusals to give instructions to the jury.

No fair-minded man after reading the testimony given, both for the plaintiff and for the defendant, and the instructions requested by the defendant and those actually given by the Court, could possible come to any other conclusion than that the case was not submitted to the jury fairly and correctly upon the evidence. The instructions requested by the defendant correctly state the law as applicable to the facts which the testimony proved or tended to prove, but they were not given as

requested. On the contrary, the Court changed and modified them, and wholly refused to give some of them. It pared and whittled down those that it did give until they did not at all express the same meaning as the instructions requested by the defendant, and misstated the principles of law as applicable to the facts which the testimony proved or tended to prove. There can be no doubt upon the plain facts of the case and upon plaintiff's own testimony that he was not entitled to recover in this action, and upon any fair and proper presentation of the case by the Court to the jury the jury must have so found. We point out below many particulars in which the Court erred in its instructions and refusals to instruct the jury. More might easily be pointed out, but we deem these sufficient and conclusive that this Court should reverse the judgment and grant a new trial.

The attorney for the defendant below requested the Court to instruct the jury as follows (Record p. 102):

"8. Although the law, as a general rule, in such cases as this requires an employer to exercise due care in supplying safe structures and instrumentalities for his servant to work with, yet he is not obliged by the law to do this absolutely. If the servant knows it at the time he enters the service or afterward he becomes informed of the fact that such structures or instrumentalities are unsafe and dangerous, the employee having knowledge of his employer's habits and methods of conducting his business in this regard, and with such knowledge, upon or continuing in such service for the stipulated reward, cannot complain of such habits and methods or recover damages for an injury resulting therefrom; and if you find that it was the course pursued in this instance by the defendant to carry on the business of mining while the walls and surroundings in the mine were unsafe and dangerous, and this fact was known to the plaintiff, and that he

also knew the character of the dangers there existing and yet entered upon and continued in said service, he assumed the risk of such dangers and is not entitled to recover in this action."

The Court refused to give this instruction, and the defendant duly excepted to its ruling (Record, p. 103).

Neither this instruction, nor the substance of it, in any other form was given by the trial Court; yet this instruction requested clearly states the correct rule of law. The defendant had a right, if it chose so to do, to carry on the business of mining while the walls and surroundings in the mine were unsafe and dangerous, and if the plaintiff Reddon entered upon his employment knowing of the existence of such dangers, he was not entitled to recover. This rule of law is settled by a large number of adjudged cases, some of which are stated on this brief (pp. 21–28, 33–37, 47–50).

In refusing this instruction the Court proceeded upon *the erroneous notion that the defendant was bound to keep the mine in a reasonably safe condition.* The authorities just referred to show that this is not the law. They show that the defendant had the right to carry on its business of mining while the walls and surroundings in the mine were unsafe and dangerous; and that, inasmuch as the plaintiff Reddon knew of the existence and character of the danger, he was not entitled to recover in this action. That the plaintiff did know fully of these dangers we have already shown (*supra*, p. 20). It follows, therefore, that the Court in refusing this instruction erred. The following authorities, and those referred to elsewhere on this brief are conclusive on this point.

In *Ladd vs. New Bedford Railroad Co.*, 119 Mass., 412, the facts were as follows: Plaintiff, a servant of defendant, was injured while riding in one of defendant's cars by the car being thrown from the track. Plaintiff alleged negligence: 1st, in not having a proper switch; 2d, in the imperfection of its cars by the want of proper check-chains. Chief-Justice GRAY, giving the opinion of the Court, said (p. 413):

"2. Upon the question whether check-chains were a usual and proper precaution to be taken by the defendant, the evidence was conflicting. *But the plaintiff's own testimony* showed that for a long time he had been in the employ of the defendant corporation, and had been of opinion that to run trains of cars without check-chains was not safe for passengers; that he knew that some of the defendant's cars were not provided with check-chains; and that he did not notice when he took this car, nor until after the accident, whether it had check-chains or not.

Every corporation has the right to carry on a business which is dangerous, either in itself *or in the manner* of conducting it, if it is not unlawful and interferes with no rights of others; and is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business *in the manner* in which it is *conducted*, for an injury resulting therefrom" (citing cases).

"This is not a case in which the premises or instruments, upon or by means of which the business is carried on, are *temporarily* defective, in which case the master may be liable, especially if he has promised the servant to repair them and has failed to do so" (citing cases).

The Court in that case had directed a verdict for the defendant, notwithstanding the fact that the evidence was conflicting (and for that reason if there had been nothing else in the case the evidence would have been for the jury) as to whether the defendant was negligent

in not providing check-chains. The Supreme Court held that such direction of a verdict for defendant was right; *on the ground that plaintiff's own testimony showed his knowledge of the danger, and therefore showed that he was not entitled to recover damages.* That case is, therefore, exactly in point as showing what the trial Court should have done in the present case.

In *Buzzell vs. Laconia Mfg. Co.*, 48 Me., 113, the Court say (p. 121):

"If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk and cannot recover. He might leave if he chose, but, choosing to remain, he cannot remain at the risk of the master. Every employer has a right to judge for himself how he will carry on his business, and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service, or, having entered, whether they will remain."

As was said in *Hayden vs. Manufacturing Co.*, 29 Conn., 548, 558:

"*An employee having knowledge cannot claim indemnity, except under particular circumstances.* He is not secretly or involuntarily exposed, and, likewise, is paid for the exact position and hazard he assumes."

In *Assop vs. Yates*, 2 H. & N., 768, the plaintiff had complained to his employer of the condition or position of a hoarding near which he was at work. He was afterwards injured by reason of the position of the hoarding. But the Court held that as the plaintiff knew all the facts, and the danger, whatever it was, and notwithstanding such knowledge voluntarily continued at work, he could not recover; and that the case was rightly taken from the jury on this ground.

MARTIN, B., said (p. 770):

"It was contended that there was a case for the jury. We think that there was not. First, because, after having complained of the hoarding and knowing all the circumstances, he voluntarily continued at work."

In *Frazier vs. Penn. R. R. Co.*, 38 Pa. St., 104, 111, the Court say:

"But if the plaintiff knew that his conductor was habitually careless, and chose to continue in service with him, and did not inform the company of his known acts of carelessness and *refuse to serve with him*, he can have no claim against the company for injuries suffered from further carelessness, even if the company did also know (citing cases). The Court below was in error in refusing to give this instruction to the jury."

In *Senior vs. Ward*, 1 Ellis & Ellis, 385, the facts were as follows: The workmen descended into the mine by means of a cage let down by a rope. The rule of the mine required that the rope be tested every morning before any person descended. This rule was habitually violated, and the deceased knew that fact. He, with others, got into the cage one morning; the rope broke, and he was killed. The Court held that, as the deceased knew the facts and yet exposed himself to the danger, the plaintiff could not recover, quoting the maxim, *volenti non fit injuria*

In *Sullivan's Adm. vs. Louisville Bridge Co.*, 9 Bush (Ky.), 81, the facts were that plaintiff's intestate was using an unsafe platform, which he knew was unsafe, and was precipitated into the river and drowned. The Court held that the knowledge of the danger by the deceased, and his voluntary use of the platform notwithstanding such knowledge, constituted a bar to

any action by plaintiff for his death. The Court say (p. 89):

"In an examination of many authorities on this subject we have found no case where the employer, either from his own neglect or that of his agent, was held liable when the party using the material furnished him, and receiving an injury therefrom, knew before the injury was received as much about the material used and its defectiveness as the party furnishing it."

The trial Court erred in refusing to give the 7th instruction requested by the defendant and in giving its own 11th instruction instead.

The 7th instruction requested by the defendant was as follows (Record, p. 102):

"If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe, but still concluded it would not fall before he and his fellow-laborers could clean up the loose coal at that place, then he must take the consequences of his mistaken judgment, and your verdict will be for the defendant."

The request for this instruction was based upon the following testimony of THOMAS Tawney, in behalf of the defendant (Record, p. 81):

"Q. Did you ever talk with Mr. Reddon as to how this accident came about that hurt him?

A. Yes, sir.

Q. When and where?

A. I believe, sir, it was about eight nights after he had got hurt. I went to stop up with Mr. Reddon to see him during the night, and I asked William Reddon how he got hurt, and he told me that he was loading some coal from the side of the track and he sounded this—he thought this coal was so bad—*and he sounded*

this piece of coal, and it was bad, but he says he thought it would stand until he got through his work, and while he was performing his duty the coal came and catched him between the ribs and the cars.

Q. *So he said that he had sounded it and found that it was bad?*

A. *Yes, sir.*

Q. But thought it would hold until he got the coal shoveled up?

A. Until he got through where he was working."

The 7th instruction requested by the defendant above quoted clearly and accurately states the law as applicable to the facts testified to by Thomas Tangey. If the case was properly submitted to the jury at all, then this evidence of Thomas Tangey which showed or tended to show that the plaintiff Reddon sounded this coal at the particular place where he was injured and found that it was dangerous, but concluded that it would hold until he got the coal shoveled up, should have been submitted to the jury with the above quoted 7th instruction requested by the defendant. If this case was a proper one to submit to the jury at all, and if this testimony was true—a fact in that event to be determined by the jury—then it showed conclusively that Reddon knew of the precise danger to which he exposed himself and assumed the risk of the very injury which befell him. It makes no difference whether the coal at this particular point seemed to the plaintiff Reddon to be *very* dangerous or only ordinarily dangerous—he assumed the risk of the falling coal *whatever that risk was*. With the *degree* of danger to which he was exposing himself we have nothing to do. It was not a matter for an expert whether the coal was likely to fall; the testimony all shows that ordinary employees in the mine knew when coal was likely to

fall, and were in the habit of testing to ascertain the fact, just as Thomas ~~Lumsden~~ Langer testified Reddon tested the rib at the place where he was injured.

But the trial Court, instead of giving the 7th instruction requested by the defendant gave a certain other instruction, numbered 11th (Record, p. 99), which was clearly incorrect and misleading. This instruction—the eleventh actually given—was similar in some respects to the 7th instruction requested by the defendant, but it was materially and vitally different from that instruction. In order to show clearly the difference we print the two in parallel columns, printing the words which are not the same in both in italics.

Instruction Requested (Record, p. 102).	Instruction Given (Record, p. 99).
"7. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe, but still concluded it would not fall before he and his fellow-laborers could clean up the loose coal at that place, *then he must take the consequences of his mistaken judgment, and your verdict will be for the defendant.*"	"11. If you find from the evidence that the plaintiff, just prior to being injured, sounded or otherwise examined the coal which subsequently fell upon him and caused the injury complained of and found that it was not safe *and that the danger was imminent*, but still concluded that it would not fall before he and his fellow-laborers could clean up the loose coal at that place, *then the plaintiff cannot recover.*"

It will be noticed that the Court interjects into the instruction requested by the defendant the further and unnecessary condition that the danger must have been

"*imminent*" in order that the plaintiff Reddon should be barred from a recovery by reason of his having examined the coal and found that it was dangerous, and still concluding to accept the risk. The instruction so qualified misstates the law. Reddon accepted the danger, *whatever it was*, whether great or small. According to the instruction actually given by the Court the danger must have been "*imminent*," whatever meaning that may have conveyed to the jury. The jury might well have inferred—indeed it is almost certain that they *must* have inferred—from this instruction that Reddon was justified in undertaking to remove the coal unless the coal was *actually falling or certain to fall before Reddon could shovel up the coal.* Such is not the law.

If the jury believed the testimony of Thomas ~~James~~ Tanzey, above quoted, then, if properly instructed, they must have found a verdict for the defendant; for this testimony shows conclusively that Reddon knew the precise danger from the falling coal, and assumed the risk of injury. The refusal of the Court, therefore, to give the 7th instruction requested by the defendant, and the giving of its own 11th instruction instead, was error prejudicial to the defendant, for which this Court should reverse the judgment and direct a new trial.

The trial Court erred in refusing to give the 3d instruction requested by the defendant, and in giving its own 7th instruction.

The first paragraph of the 3d instruction requested by the defendant was as follows (Record, p. 101):

"3. A master is never the insurer of the life or safety of his servent. He simply engages to exercise ordinary care in furnishing and keeping his machinery, appliances, structures or workings, as the case may be, in a reasonably safe condition, and if he fails to do so he is liable to his servant for any injury which may befall him by reason of such failure while engaged in the due course of his employment, provided the servant is at the time ignorant of such failure, and has not, in the exercise of reasonable diligence, the means of knowing it, and is also in that connection free from fault or negligence on his own part."

The request for this instruction was based upon the testimony of the case, all of which went to show that the plaintiff Reddon, at the time of the injury, knew the actual condition of the mine and of the dangers to which he was exposed, and also upon the particular testimony of THOMAS ~~JAMES~~ Jones (quoted on this brief, p. 50), to the effect that Reddon, at the time when he went to work at the place where he was injured, sounded or examined the coal that afterwards fell upon him, and found that it was dangerous, but, nevertheless, voluntarily went to work at that place. This request was also based upon the further fact that even if Reddon's own testimony be believed, to the effect that he did not sound the rib before going to work in order to see if there was danger, though he was familiar with the fact that coal was constantly falling and knew how to sound or test the rib to see if the coal was likely to fall (Record, p. 35).

The Court, instead of giving the first paragraph of instruction 3 requested by the defendant, gave the first paragraph of its own instruction 7. In order to show the difference between the instruction requested and that given, we print them both in parallel columns

with the words which are not the same in both printed in italics.

Instruction Requested (Record, p. 101.)	Instruction Given (Record, p. 98).
"3. A master is never the insurer of the life or safety of his servant. He simply engages to exercise ordinary care in furnishing and keeping his machinery, appliances, structures or working, as the case may be, in a reasonably safe condition, and if he fails to do so, he is liable to his servant for any injury which may befall him by reason of such failure while engaged in the due course of his employment, provided, *the servant is at the time ignorant of such failure, and has not, in the exercise of reasonable diligence, the means of knowing it*, and is also in that connection free from fault or negligence on his own part."	"7. You are further charged, gentlemen of the jury, that the defendant was not the insurer of the safety of the plaintiff in its employ. It simply engaged to exercise ordinary care, to keep the mine and the workings in a reasonably safe condition, and if it failed to do so, it is liable to the plaintiff for any injury which may have befallen him by reason of such failure while the plaintiff was engaged in the due course of his employment, provided that you believe from the evidence that the plaintiff at the time was free from fault or negligence on his own part."

It will be noticed that the Court omits entirely one branch of the proviso to the instruction requested by the defendant, namely, the proviso that "*the servant is at the time ignorant of such failure and has not in the exercise of reasonable diligence the means of knowing it.*" This part of the instruction should have been given. The rule of law is clear that the servant assumes the risk of all dangers of the employment of which he has

knowledge or of which in the exercise of reasonable diligence he has the means of knowledge, whatever those dangers may be; this is so, and whether all possible precautions are taken to keep the appliances, structures, &c., in a reasonably safe condition or not, or whether, as a matter of fact, the employment is carried on while they are in a dangerous condition. The authorities on this brief, pp. 47–50, 21–28, 33–37, show that the servant assumes the risk of the employment *as it is actually carried on*, no matter whether the master keeps the structures in a reasonably safe condition or not, provided the servant knows or, in the exercise of reasonable diligence, has the means of knowing the dangers which actually exist. These considerations just mentioned furnish a complete answer to the action of the plaintiff in this case. The instruction which the Court actually gave, namely, the first paragraph of seven omitted these considerations entirely, and instead of giving them only the instruction provided "that you believe from the evidence that the plaintiff, at the time, was free from fault or negligence on his own part." Under this instruction, as actually given, the jury may well have believed that the plaintiff Reddon could recover in this action if he was not guilty of any *positive* act of neglect on his own part. This instruction failed entirely to consider the effect of *his knowledge of the danger* as constituting a bar to the recovery.

This omission to instruct the jury as to the fact of the plaintiff's knowledge of the danger, in connection with the other parts of the instruction in that paragraph, was not cured by anything that follows in the second paragraph of instruction seven which was given.

The two paragraphs of instruction No. 7, though included in one number, are really two separate instructions; and each should be complete in itself, or at least so complete as not to mislead the jury. This was not the case, as we have just shown.

The trial Court erred in not giving the first instruction requested by the defendant, and in giving its own second instruction instead.

The first instruction requested by the defendant is as follows (Record, p. 100):

"One who, by his own negligence, has brought an injury upon himself cannot recover damages for it. A plaintiff in such cases is entitled to no relief, but where the defendant has been guilty of negligence also in the same connection the right of plaintiff to recover depends upon the facts. The question in such cases is, first, whether the injury was occasioned entirely by the negligence or improper conduct of the defendant; or, second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution on his part, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover."

This instruction contains a correct statement of the general principles of law as to the liability of a defendant in an action for negligence. It is in the exact language of the opinion of this Court in *Railroad Co. vs. Jones*, 95 U. S., 439. The Court instead of giving this instruction gave its own instruction No. 2 (Record, p. 98). In order to show the difference between the instruction requested and the one actually given we print them here in parallel columns, printing in italics the words which are not the same in both.

Instruction Requested (Record, p. 100).	Instruction Given (Record, p. 98).
"1. *One who, by his own negligence, has brought an injury upon himself cannot recover damages for it. A plaintiff in such cases is entitled to no relief, but where the defendant has been guilty of negligence also in the same connection,* the right of plaintiff to recover depends upon the facts. The question in such cases is, *first,* whether the injury was occasioned *entirely* by the negligence or improper conduct of the defendant; or, second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution on his part that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists it is known as contributory negligence, and in such case the plaintiff cannot recover."	"2. *Where the defendant has been guilty of negligence, causing the injury,* the right of the plaintiff to recover depends upon the facts. The question in such case is whether the injury was occasioned by the negligence or improper conduct of the defendant; second, whether the plaintiff himself so far contributed to the injury by his own negligence or want of ordinary care and caution that but for such negligence and want of ordinary care and caution on his part the misfortune would not have happened. Where such concurring negligence on the part of the plaintiff exists, it is known as contributory negligence, and in such case the plaintiff cannot recover."

It will be noticed that the Court wholly omits the following sentence: "*One who by his own negligence has brought an injury upon himself cannot recover damages for it. A plaintiff in such case is entitled to no relief.*" That this is a correct statement of the law there

can be no doubt, and there was evidence tending to show (testimony of THOMAS JAMES, record, p. 81, *supra*, p. 50) that the defendant had sounded or tested the particular coal which afterwards fell upon him, and, notwithstanding that fact, went to work at that place where he was thus injured. This testimony showed or tended to show that Reddon brought the injury upon himself. This part of the instruction, therefore, should have been given, as requested.

A part of this instruction requested was as follows: "The question in such cases is whether the injury was occasioned *entirely* by the negligence or improper conduct of the defendant, &c." The instruction as given omitted the word "*entirely*," so that the instruction as given read: "The question in such case is whether the injury was occasioned by the negligence or improper conduct of the defendant." This instruction so given does not correctly state the law as applicable to the case, for, if the injury was brought upon plaintiff *partly or wholly* by his own negligence, he cannot recover. The defendant is not liable unless the injury was caused "entirely" by its negligence, and not partly or wholly by the negligence of plaintiff. This Court has stated the law in *Jones vs. R. R. Co.*, 95 U. S., 439, referred to *supra*, exactly as the defendant below requested the Court to state it to the jury. This Court there said that the injury must be occasioned "*entirely*" by the negligence of the defendant, otherwise the plaintiff cannot recover, and such is the settled law.

For these reasons the Court erred in not giving the first instruction requested by the defendant, and in giving its own second instruction above stated.

The Court erred in refusing to give the 9th instruction requested by the defendant.

The ninth instruction requested by the defendant was as follows (Record, p. 103):

9th. "In this case, to warrant a verdict for plaintiff, you must find by a preponderance of testimony, that the injury was caused solely by the negligence of the defendant, and that there was no fault, negligence or carelessness on the part of the plaintiff that contributed to said injury."

This instruction is clearly correct; yet it was not given by the Court in this shape, or in any modified form. The charge of the Court to the jury from the beginning to the end *assumes* the existence of negligence on the part of the defendant—an assumption which the Court had no right to make. If the case was properly submitted to the jury at all, the question whether there was negligence on the part of the defendant was one for the jury to determine, and they should have been instructed that it must be shown by a preponderance of testimony that the injury was caused solely by the defendant's negligence.

The charge of the Court, numbered seven (Record, p. 98), is to the effect that the plaintiff might recover, notwithstanding he voluntarily and with full knowledge of the facts worked in a dangerous place, and that he would be barred of a recovery only in a case of voluntarily, and with knowledge, or the means of knowing the facts, working in a VERY dangerous place. This

is inconsistent with the authorities, and is erroneous.

The rule of law is clear that in such case, Redden assumed the risk of the danger, *whatever* it was. The authorities referred to on this brief (pp. 47–50, 21–28, 33–37) are conclusive on this point.

See also

Beach on Contributory Negl., Sec. 12, and cases cited.

City of Erie vs. Magill, 47 Amer. Rep., 739, and note; s. c., 101 Pa. St., 616.

Schaefer vs. City of Sandusky, 31 Amer., Rep. 533; s. c., 33 Ohio St., 533.

Mansfield Coal & Coke Co. vs. McEnery, 36 Amer. Rep., 662; s. c., 91 Pa. St., 185.

Wharton on Negl., Sec. 214, and cases cited.

Meehan vs. Syracuse, &c., R. R. Corp., 73 N. Y., 585.

This error was not cured by the latter part of the instruction, which is to the effect that the plaintiff might recover if he was assured that the danger would be remedied in a reasonable time, and he, relying thereon, continued to work; for the jury may have found, and most likely did find, that such promise was never made, but gave the plaintiff the verdict on the theory that the entry, although dangerous, and well known to be to the plaintiff, yet was not *very* dangerous.

This instruction was also erroneous in that it involved the hypothesis that evidence was given that a promise had been made to repair the defect in a reason-

able time, or in some stated time which the jury might find to be reasonable, when such was not the fact.

If the jury found that the promise was made, but that it was indefinite as to time, as it clearly was if made at all, then it furnished no ground of recovery.

See this brief, *supra*, pp. 39–42; also

Mor., Houghton & Ont. R. R. Co. vs. Spear, 14 Mich., 169, referred to at length, *supra*, p. 41.

III.

For the reasons above stated the judgment of the Supreme Court of the Territory of Utah in this case should be reversed, with directions to grant a new trial.

JOHN F. DILLON,
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SUPREME COURT OF THE UNITED STATES.

UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM C. REDDON,
Defendant in Error.

BRIEF AND ARGUMENT.

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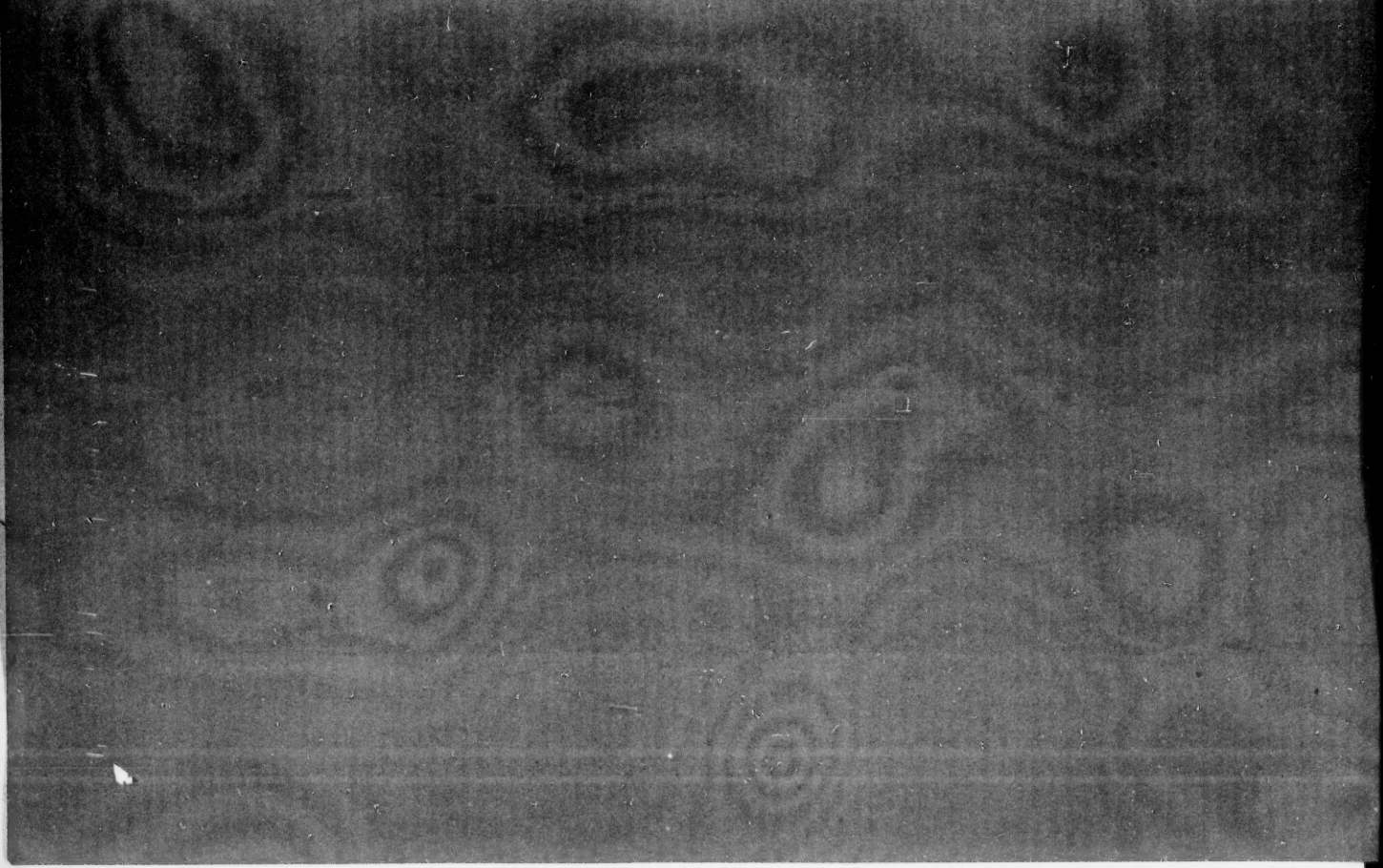
Star Printing Co.



SUPREME COURT OF THE UNITED STATES.

UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM C. REDDON,
Defendant in Error.

STATEMENT OF FACTS OF THE CASE.

This action was brought to recover damages for injuries received in the mine of the defendant; plaintiff was a laborer in the employ of the defendant, and worked for it in a certain coal mine at Grass Creek, of which the defendant was the owner, and which it was operating. The injury was received in the fifth level of the mine, by a fall of coal upon the plaintiff. That level had been dangerous for some time, and the defendant had commenced to timber the level; and, having timbered a ways, stopped on account of being too busy.

A few days before the accident, the plaintiff went to the foreman of the mine, Mr. Thomas Thomas, who had charge of the entire work, and told him that the entry was dangerous, pointing out particular places of special danger, and suggesting that the coal be taken down so as to avoid danger. The fore-

man of the mine promised to remedy it in a short time, but said he could not do it just then.

Plaintiff was a track-layer, working in the entry; and, on the day of the injury, the foreman said to him and other persons engaged like him, that he wanted some coal loaded which had fallen in the entry, directing them where to load the coal, saying, "Hurry it, and clear up, for I want to send coal out here this evening." As they started to shovel up the coal, the side of the entry fell down, catching the plaintiff under about a ton of it, and crushing his spine.

Since that injury, he has been more than helpless, and is not only unable to wait upon himself, but has to be waited upon.

The jury awarded a verdict of $20,000, and the court reduced it to $15,000.

The negligence of the defendant consists: first, in not properly timbering the entry; and, second, in not taking down the coal as requested by the plaintiff.

The plaintiff was induced to remain by the assurances made by the foreman. The conversation was as follows, folio 18, p. 13:

"Q. While he was in charge there, what did you do by the way of calling his attention to the dangerous condition of this entry? A. I told him that the wall at the entry was dangerous, and that if the coal was not taken down, that somebody would get hurt sooner or later." * * * * * "I took him, and told him this coal was going to fall, if it was not taken down. I was afeard, and took him along the road and all the way in, and sounded the coal for him, until I got him into the room where Mr. Locke worked—John Locke—and that was the dangerousest place there was, between his rib and the next one, and he says, "Bill," he says, "that won't fall yet. You have no idea how this coal will hang;" and he says, "I can't stop the turn to take it down now; but," says he "I will take it down

some other time," Them was just the words he used, as near as I can get at it.

"Q. What more did he say, if anything that he wanted to keep the turn running. A. Why he didn't say anything, only as I told you; he said that he couldn't stop the turn then to take it down, but that he would take it down some other time—have it taken down."

No question was raised on the trial but that Thomas Thomas was foreman for defendant, and in all instances authorized to act for it.

BRIEF AND ARGUMENT.

I.

The first assignment of the plaintiff in error, is that the damages were excessive.

In a part of the 5th Assignment of Error, the rule of damages laid down by the court is alleged as error. That rule is as follows:

"If you are satisfied from the evidence that the plaintiff has a right to recover, you should award such damages as will, in your judgment, fully compensate the plaintiff for the injuries and losses that he may have sustained in consequence of the alleged misconduct of the defendant.

"In estimating the damages, the jury may take into consideration whatever of bodily and mental pain and suffering the plaintiff has endured and the fact (if such be the fact) that by reason of the injuries received he may not be as well able to labor and earn a living hereafter as he was before the injury; also the extent to which his injury may permanently disable him."—Rec. Folio 122, p. 99, charges 12 and 13.

This is the correct rule of law laid down by elementary writers and in conflict with none.

Berg vs. C. M. & St. P. R. R., 50 Wis. 419.
Solon vs. Vir. Cy., 3 Nev., 107.
1 Suth. Dam., 810.
Atchison R. R. Co. vs. Moore, 15 Am. & Eng. R. R. cases, 321.
Bowers vs. U. P. R. Co , 7 Pac. Rep. 251.,
Knapp vs. Sioux City & P. R. R., 32 N. W. Rep., 18.
Cox vs. N. W. Stage Co., 1 Idaho, 385.

These cases are cited, not merely as illustrating the rule of damages, about which there could never be any question; but also as showing the amount which has been awarded in excess, none of which were so serious in their effects and consequences as we have in this case. Here was a man, not only deprived of all ability to labor, but made a constant dependent upon his friends and relatives, and requiring at least one attendant during the remainder of his life. He is left in a condition where the suffering will be unending as long as he lives. His backbone is so depleted and injured that only by the use of crutches, by leaning with both hands on them constantly, can he exist;—in pain all the time, and all the time an object of care and solicitude to others. The injury is more severe than any to be found in the books. The verdict of the injury was not excessive. $20,000 was light enough. The court, in pursuance of a practice much in vogue, required the plaintiff to reduce the verdict to $15,000. The plaintiff in error cannot complain of that action. If anyone was injured by it, it was the defendant in error.

See 1 Suth. Dam., 810.

In the court below, counsel cited the case of Koeltz vs. Bleckman, 46 Mo., 320, as critising the practice; but that case has been

ignored and overruled by later cases in the same State, and everywhere else.

Johnstone vs. Morrow, 60 Mo., 339.
Sharpe vs. Johnstone, 76 Mo., 674.
15 Fed. Rep., 490.

I have discussed this question because I believe that there is no justice or merit in this exception.

But in addition to the foregoing answer to the first assignment, this court will never inquire into the question of the sufficiency or insufficiency of damages. That is a question of fact, which this court deems not within its duty to examine.

In Wabash Ry. Co. vs. McDonald, 107 U. S., 456, Judge Harlan uses the following language:

"That we are without authority to disturb the judgment on the ground that the damages are excessive, cannot be doubted. Whether the order everruling the motion for a new trial, based upon that ground was erroneous or not, our power is restricted to the determination of questions of law, arising upon the record."

II.

The second assignment of error is also open to the objection that it is calling upon this court to examine into the facts of the case, and not into a question of law. This court does not review the evidence of actions to determine the sufficiency or insufficiency of the verdict However, the evidence was ample to warrant the verdict, and no other verdict could well have been given upon the facts of the case.

It must be conceded that it is the duty of the master to procure for the servant a safe place to work in, that is. as safe as

the nature of the business and surroundings will permit. This mine, at the time of this transaction, was undergoing a "crush" or "squeeze;" that is, the ground was settling. The entire mine was unsafe. So far as this hazard is concerned, we claim no liability on the part of the master. But the master knew it; his foreman knew it. The extra danger occasioned by it required extra caution on the part of the master and foreman. It required extra caution and effort to protect the laborers in their lives and in their persons. The fifth entry was known to be dangerous before work began upon it. It was for that reason that they began to timber it; and after timbering several hundred feet, suddenly the timbering is stopped. The reasons that the foreman gave were not such as to justify the stopping. Referring to Rec., p. 10, Fol. 14, the question is asked with regard to the reasons of the timbering, which had been just discussed at the previous page, was answered by the witness thus:

"He told Mr.Williams to stop timbering now for the present; he would like to get the track in, so that he could get the coal out, that he would timber it afterwards.

Q. Did he give any reason for stopping the timbering then? A. Well, he was in a hurry to get the coal out.

Q. Said he was in a hurry. A. Yes, sir.

Q. What coal did he have reference to, if you know? A. Why, fetching the coal out of the entry.

Q. Out of the back part of the entry? A. Yes, sir."

This was in the middle of January. The man who gave these orders was the absolute foreman. He took the place of the master in that regard. Timbering at all was evidence that the foreman regarded it as necessary to timber. Ceasing to timber simply because he was in a hurry, was leaving the men to take their chances, for the purpose of crowding out more

coal and hurrying the work. Had the timbering been completed further in, this accident would have never occurred. In that is negligence. But beyond that, we show that attention was called to this whole entry. In the paragraphs stated in the opening statement of this brief, the whole entry was complained of. The foreman knew then that it was unsafe; but for the same reason that he stopped timbering, he could not stop then to fix the entry. This very plaintiff told him that it was dangerous, but he said he could not stop the "turn," (meaning trip—the work,) to take it down; but he would do it some other time. This was calling attention of the master to the unsafe condition. The event proved the truth of the warning thus given. Perhaps not in the identical place pointed out. The foreman was told that the whole entry was unsafe, and while not locating the particular lump of coal that actually fell, the plaintiff complained of the entire entry. This was negligence of the plainest kind on the part of the defendant. This assignment of error, however, alleges that the plaintiff himself knew it was unsafe and dangerous. That would be a question of contributory negligence. He was assured by the foreman, upon whom he had the right to rely, whose skill and capacity and experience he had the right to put faith in, that there was no danger. He was further assured that the entry would be fixed, and the defect adjusted, so that it would be safe to work there.

In opposition to this assignment or error, we cite the following cases:

Conroy vs. Iron Works, 62 Mo., 35.
Sherman & Redfield Neg., Sec. 96.
Parody vs. R. R. Co., 15 Fed. Rep., 205.
Holmes vs. Clarke, 2 Thomp. Neg., 953.

It is not always contributory negligence on the part of the employee, that he knows of a danger. There are many exceptions to it. He may depend upon the assurance of his employer that the danger is less than he apprehends, or he may depend upon the assurance of his employer that the defect will be cured, or his business may be such that he is not required to keep in mind, at every moment, the particular defect of which he has previously been notified, or which he has previously observed.

Snow vs. R. R. Co., 8 Allen, 441.
Kane vs. R. R. Co., 128 U. S. 91.
Hough vs. R. R. Co., 100 U. S., 225.
Huddleston vs. Lowell, Mch. Shop, 106 Mass., 282.
Ford vs. Fitchburgh R. R. Co., 110 Mass., 241.

The rule adopted in Patterson vs. Pittsburgh & Connellsville R. R. Co., as to contributory damages, seems to apply to the facts of our case:

"But where the servant, in obedience to the requirement of the master incurs the risk of machinery which, though dangerour, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the rule is different. In such case, the master is liable for resulting accidents."

On the argument in the Supreme Court of Utah, the counsel for the defendant below contended that a promise on the part of the employer or foreman must be definite as to the time when the defect would be remedied, or else the employee could not rely upon such promise; and cited in support of it the case of Marquette R. R. Co. vs. Spear, 44 Mich., 169.

An examination of that case will show that it was not a case arising between employer and employee at all. The relation did not exist; it was not an action by the servant, but the prom-

ise was made by one employee for using defective appliances. The employer himself was the one injured; the employee was the defendant. The action was not founded on the relationship of master and servant. The theory of the argument, however, is entirely rebutted in the case of Hough vs. R R. Co., 100 U. S., as it will appear by that case, that there was no definite promise as to time. It was simply a vague assurance, frequently repeated, that the employer would remedy the defect. The promise in this case was more definite in that here the foreman made a double assurance, first, that there was no danger. On that alone the employee had the right to rely. Second. That although he could not stop the "Turn," that is the work, then, he would fix it as soon as he could. This accident happened within a very few days after that promise.

III.

The third assignment of error relates to the admission in evidence of the situation of the entry as to being timbered or otherwise, as to when it was timbered, and when and why the defendant ceased timbering.

This evidence is admissible for two reasons: First, to explain the situation, to show how the entry was made, so as to illustrate the position of the parties at the time of the injury; and second, it was admissible as evidence of negligence. The complaint alleged—

"That the defendant, through its carelessness and negligence, allowed the roof of said mine, and its different rooms and apartments, to become unsafe and insecure. That said defendant well knew the unsafe and insecure condition thereof."

Failure to timber, when timbering was necessary, was evidence of its being insecure. The fact that he timbered, and the reason why he left off timbering, was evidence that tended to show the knowledge of the foreman of the company of its unsafe and insecure condition. For these reasons the court was correct in admitting the evidence.

IV.

The 4th assignment of the plaintiff in error is, that the court refuses to grant a non-suit.

The merits of the case have already been considered. On this motion for non-suit, the evidence of the plaintiff was to be taken as true. Plaintiff had shown the negligence of defendant in not properly timbering. He had shown its negligence in not providing for the safety of the mine; when the attention of its foreman was called the fact that the entry was insecure, and the coal was liable to fall. These were sufficient reasons why the nonsuit should not be granted. The question of contributory negligence was one for the jury. Contributory negligence is not ground for non-suit—was no evidence of it in that case.

In addition to the authorities already cited, I cite the following:

Jones vs. R. R. Co., 128 U. S. 443.
R. R. Co. vs. Stout, 17 Wall. 657.
Laning vs. R. R. Co. 49 N. Y. 536.
99 N. Y. 368.
94 N. Y. 375.
95 N. Y. 552.
36 Iowa 278.
24 Fed. Rep. 906.

After the motion for a non-suit was denied, the defendant himself introduced evidence of great length. This was a waiver of the motion for non-suit.

Union Ins. Co. vs. Smith, 124 U. S., 424.
Accident Ins. Co. vs. Crandall 120 U. S., 530.
G. T. R. R. Co. vs. Cummings, 106 U. S., 700, and other cases cited in the foregoing.

V.

The fifth assignment of error is insufficient to conform to any rule, or law or practice. Mere assigning error to the whole charge, without pointing out any particular part or parcel, is not sufficient.

Danielson vs. Daniel Dyckman, 26 Mich., 170.
Lucas vs. Brooks, 18 Wall., 456.

In Lucas vs. Brooks, the court says:

"It would be sufficient to say of the seventh assignment of error, that it was made in the entire disregard of the rules of this court. It avers simply that the court erred in giving the instructions which were given to the jury on its own motion (that is, in the general charge), in lieu of the instructions asked for by the parties; but in what the error consists, or in what part of the charge it is contained, is not specified. That under the twenty-first rule this is an insufficient assignment is very plain."

The statute requires an assignment as specific as the twenty-first rule.

The assignment is, that the court erred in giving requests asked for by the defendant in error. The record does not show that the defendant in error asked any request. The record shows that a charge was given, which is divided off into numbers—fourteen different parts. Who requested these, does not

appear. Many of these requests are given in the language of the requests of the counsel for the plaintiff in error, defendant in the trial below. Compare the charges given, No. 7, Fol. 120, with defendant's request No. 3, Fol. 123. No. 9 evidently was not requested by the plaintiff below. Requests Nos. 3, 4, 5, 6 and 7 respectfully, are given in charges 7, 8, 9, 10 and 11. However, the whole charge, standing together, is one that defies criticism. Counsel is unable to point out any particular part of it which he thinks is objectionable.

We submit that the entire charge is within the authorities already quoted and the decisions of this court. It is borne out in every part of it by the case of Hough vs. R. R. Co., 100 U. S. 225; and Kane vs. Northern C. R. R. Co., 128 U. S., 91; and Northern P. R. R. Co. vs. Herbert, 116 U. S. 642.

VI.

The requests on the part of the defendant below were mainly given; so far as they were not given, they were not law.

a.—The first request, there was no evidence to sustain. There was no evidence to sustain the theory that this plaintiff had brought the injury upon himself. There was evidence upon which it was claimed he was guilty of contributory negligence; but the doctrine of contributory negligence was fully and fairly given in the charge. See charges given, Nos. 3, 5, 6, 7, 9 and 10. These more than covered the ground asked by request No. 1 by the defendant below.

b.—No. 2 of the defendant below is not in accordance with the law. It requests the same measure of diligence on the part

of the servant as on the part of the master. This is expressly negatived in the case of Hough vs. R. R. Co., 100 U. S., and the other cases there cited; and in the case of Patterson vs. R. R. Co., 76 Penn., 389.

c.—No. 3 you will find has been given in No. 7, almost word for word. There may be a few words cut short, but the meaning is the same.

d.—The fourth request of defendant below is not the law. It requires the plaintiff to exercise a higher degree of care and caution than the defendant. Exactly the reverse is the rule, as laid down in the cases heretofore cited. The request requires the plaintiff to exercise a high degree of care and caution to be exercised by himself to avoid injury. What care and caution to be exercised by himself, always depend upon the circumstances of the case. That the jury were told the plaintiff must exercise; yet it is given in charge No. 8 verbatim.

The 5th request of the defendant below is substantially given in the 9th charge. The 6th request below is the same, substantially, as the second, and requires the servant to exercise the same degree of care that the master does; which for reasons stated under the second head, is not the rule.

The 7th request is obviously not the law, because from that it would appear that if he exercised caution, he would be more liable than if he did not exercise caution. He had previously complained of the defect of the whole entry. If he was mistaken as to any particular point in it, through error of judgment

or otherwise, that would not exempt the defendant from liability for negligence in not taking care of the whole entry.

VII.

The 7th assignment relates solely to the requests refused, Nos. 8 and 9 being specified by themselves.

The 8th request would seem to excuse mine owners, if it could be proven that they were more than ordinarily negligent. In no case, it is believed, can be found the doctrine that the miner or the master has been permitted to escape liability by proving that he was unusually careless. The court in this case explained to the jury that the ordinary risks of the dangerous employment were undertaken by the servant. This was the extent to which the law goes.

The 9th request was not the law, in so far as it requires that the injury must be caused solely by negligence of the defendant. It might be caused by the contributory negligence of a co-employee, and yet the defendant be liable.

The court did charge in substance that if the defendant contributed to the injury sufficiently to have caused it, and but for that contribution the injury would not have happened, then he could not recover. This is the extent to which the rule goes.

At the time of preparing this brief, I have been unable to see any brief filed in this court by the plaintiff in error. So far as any brief filed in the court below, I believe there is no reason why this judgment should be reversed.

I take pleasure in referring also, as an authority in the case, to the very able opinion of Judge Henderson, which accompanies the record, and is found therein on pages 107-114, inclusive, and make the same a part of our brief by this reference.

ARTHUR BROWN,

Attorney for Defendant in Error.

(The Supreme Court, U.S.)
FILED
OCT 17 1891

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 45.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM C. REDDON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

ADDITION TO BRIEF FOR PLAINTIFF IN ERROR.

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Addition to Brief for Plaintiff in Error.

Since the brief was prepared for plaintiff in error for the last term of this Court, a few cases have been decided having an important bearing upon the questions presented in this case. Among these cases is

Bunt vs. Mining Company, 138 U. S., 483.

This case is very much in point both as to the facts and the rulings of law presented for consideration. The action was to recover damages for the death of plaintiff's husband caused by the defendant's alleged negligence. The answer alleged, among other things, that the death was caused by the husband's own negligence, and not

by any negligence of the defendant. The facts in that case are stated by Mr. Justice GRAY, in the opinion of the Court, as follows:

"While Bunt and three others, all four experienced miners, were in a tunnel in the rock of the defendant's mine, thirty-five hundred feet from its mouth, the superintendent came in, and discovered, by looking at the roof of the tunnel, and by sounding it with a pick, that it had been shattered by blasting further in; and told the men to prop it up with timbers from that point to the end. There was already a post of timber at that point, which had been put there only to hold the 'spiling' or pieces of wood extending along the sides of the tunnel to keep back the 'gouge or selvage of the vein clay and slimy stuff.' The superintendent told the men that they had better put a post by the side of this one; but, on one of the men suggesting that this should be taken out and another put in its place, left it optional with them to do so or not, saying: 'If you think proper you can take out that post, but be careful of the roof; don't let it fall down on you, and be careful of the spiling.' Bunt and the other workmen decided that it would be safe to take out the post, and did so, intending to go outside to get other timber. After the removal of the post, Bunt sat down to rest under the shattered roof, and part of the rock fell upon him and mortally injured him."

The point was raised in the following manner:

"At the close of the plaintiffs' evidence, the defendant moved the Court to direct a verdict for the defendant, because the evidence would not warrant a verdict for the plaintiffs. The Circuit Court granted the motion, and the plaintiffs excepted to the direction and sued out this writ of error."

The decision and the reasons for it are stated by this Court as follows:

"The reasons stated in the opinion of the Court below, reported in 11 Sawyer, 178, are conclusive. Bunt participated in taking out the post, with full knowledge

of the danger, and, after the post had been removed, and before another had been put in its place, sat down under the shattered roof. Recklessness could hardly go farther. The evidence would warrant no other conclusion than that he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The Court therefore rightly directed a verdict for the defendant. *Randall vs. Baltimore & Ohio Railroad*, 109 U. S., 478; *Schofield vs. Chicago, Milwaukee & St. Paul Railway*, 114 U. S., 615; *Gunther vs. Liverpool, &c., Ins. Co.*, 134 U. S., 110."

The above case is exactly in point with the present case. The evidence is conclusive in the present case that Reddon had full knowledge of the danger to which he was exposing himself. For this reason a non-suit should have been granted.

FURTHER, *there was testimony to go to the jury (Record, p. 81), tending to show that on the very day of the accident to Reddon, and just before he began shovelling coal at the place where he was injured, he tested the wall with his pick, found that it was dangerous*, but concluded that it would hold until he shovelled up the coal. Nothing can be clearer than that on this state of facts, if believed by the jury (and they alone were the judges of the weight of the evidence) *Reddon had full knowledge of the danger and assumed the risk.* The Court should have so instructed the jury as requested (Record, p. 102, No. 7). It matters not whether such risk be great or small—he assumed the risk whatever it was.

Another case exactly in point is:

Lewis vs. Railroad Company, decided by the Supreme Court of Massachusetts, 26 Northeastern Reporter, p. 431.

The facts in that case form an almost exact parallel to the facts in the present case. They were as follows:

Plaintiff, while running along the pier in the performance of his duty as superintendent of defendant's drawbridge, was injured by breaking through a board which was fair on top but had rotted away underneath. He had occupied the position for three or four years, and was well aware of the general defective condition of the pier. A few days before he called the proper officer's attention to it, saying that somebody would get hurt unless it was repaired, but did not complain on his own account or offer to leave. He was told that it would soon be fixed. The Court held that he assumed the risks of his employment, and was not excused because of the promise to repair.

The case is directly in point, and the reasoning of the Court is so clear and conclusive that we quote the entire opinion, and call the particular attention of this Court to the exact parallel between the two cases. The opinion was as as follows:

"The plaintiff contends that there was evidence which would have justified the jury in finding that the rotten and defective condition of the pier which caused the accident was due to the negligence of the defendant, and in this we think he is right. He also contends that there was evidence to go to the jury that he was himself in the exercise of due care, and continued in defendant's service relying upon assurances given by one of its general superintendents that the pier would be repaired. In this, however, we cannot agree with him. The plaintiff was superintendent of defendant's draw-bridge over Fort Point channel in Boston. He had held that position between three and four years prior to the accident. Connected with and forming a part of the draw-bridge was a pier which was planked over. While running quickly along this pier in the discharge of his duty, for the purpose of catching a line from a vessel that was going through the draw, plaintiff

broke through a rotten place in the planking, and was injured in one knee so as to be permanently disabled. He testified that, though there were some holes covered up with plank, the surface of the pier 'looked as fair' as the board in front of the witness stand, 'but it was decayed; it must have been dreadfully decayed underneath, and a great many places were the same. Almost anywhere, you see, it would look very fair, and you would go down through if you didn't look out.' He also testified that a few days before the accident he had a conversation with Mr. Bent, one of the defendant's general superintendents, and told him 'the pier was in very bad condition indeed; that strangers would be apt to fall through there. Not knowing where to go they will be apt to step on some place and get hurt, and he didn't want them to get hurt. I told him it was in very bad condition, and ought to be seen to before people got hurt. Says I: "There is a number that have fell through here, and somebody is going to get badly hurt."' And in answer to the question whether he had complained to Mr. Bent before this of its dangerous condition as it affected himself, plaintiff said: 'Well, I complained of it a number of times to him. I told him "somebody is going to get hurt yet; there is a number fell through;" and the day before I got hurt there was one of the carpenters * * * fell through the corner of the house that we lived in, chock up to his hip.' Other witnesses called by the plaintiff described the appearance of the pier underneath as badly decayed; one saying that the general appearance of the pier was rotten, and another that there was not much difference between the two surfaces of the planking. These and other observations made by the witnesses were not communicated to the plaintiff, and it did not appear that he had examined the pier underneath. But he had been employed there between two and three years, and it is apparent from his own testimony that he was well acquainted with the rotten and dangerous condition of the pier, and realized that he might at any time break through. The danger was to him a constant and obvious one. He chose, notwithstanding this, to continue in his employment, and he must be held to have assumed the risk, or to have been wanting in due care, unless there was some sufficient excuse for his conduct.

"The plaintiff claims that he complained to the superintendent of the condition of the pier; that the superintendent promised a few days before the accident to repair it; and that relying on that promise, he continued in the discharge of his duties, and was injured because the pier was not repaired. It is a question how far and under what circumstances a servant, the performance of whose duties becomes dangerous through the neglect of his employer to keep in proper repair the premises where he works, is justified in relying upon his employer's promise to amend the defect and remove the danger, when he himself has full knowledge of the defective and dangerous condition which exists, and of the risk which he runs by continuing in the service. This case, however, does not present that question. The plaintiff did not testify and apparently would not testify that he continued in the defendant's employment because of the assurance of the superintendent that the pier would be repaired. Even when pressed by his counsel he could not say that he complained to the superintendent on his own account of the bad condition of the pier. He testified that in the conversation before referred to, which he had with the superintendent, the latter said, 'he would have it repaired right off, as soon as they could get round to it;' and again he says that the superintendent said, 'I will get carpenters to overhaul it and make out documents for what plank and timber they want;' and in answer to the question, 'whether or not you were relying upon that at the time of the accident,' the plaintiff said, 'I was expecting to see the carpenters there every day working; I didn't know what day I should see them.' The following questions were also put to him in regard to this conversation, to which he gave the following answers: 'Now, whether or not you depended on that conversation as a reason for remaining with the company? Answer. I calculated if we could get it in good repair, it would be splendid, because other people could not get hurt. Question. Wait a moment. Now, then, Mr. Lewis, whether or not you had complained to Mr. Bent before this of its dangerous condition as it affected yourself. A. Well, I complained of it a number of times to him. I told him, "somebody is going to get hurt yet; there is a number fell through;" and the day before I got hurt there was one of the carpenters fell through check up to his hip.' It is noticeable that nowhere in this conversa-

tion nor in his answers does the plaintiff say or imply that his continuance in the service was due to what Mr. Bent said in regard to the repair of the pier; and it would be giving to the conversation between the plaintiff and the superintendent a construction which we think neither intended nor had in mind to hold that the plaintiff was induced to remain in defendant's employ by what the superintendent said about repairing the pier, or that the superintendent, with that end in view, gave the answers which he did.

"The plaintiff seems to have called the attention of the superintendent to the condition of the pier, and to have urged its repair, not on his own account nor because the discharge of his duties was rendered more dangerous, nor because he had any intention of leaving if the pier was not repaired; but he seems to have acted in the interests of the company and in order to prevent strangers and others coming on to the pier, not knowing where to go, from getting hurt. The natural and reasonable inference from his conversation is that he expected to remain there, and, knowing the condition of the pier, expected to take the risk. His subsequent conduct in returning to the same position in the following September, and remaining till the next summer, without anything being done to the pier, and then leaving, not for that, but for some other reason, is also a strong circumstance tending to show that he did not rely upon the superintendent's statements in regard to repairing the pier as a reason for continuing in the service of the defendant. Most, if not all, the cases to which our attention has been directed by the plaintiff's counsel go upon the ground that the servant was led to continue at his employment by the master's promise that the defect complained of should be remedied. In some of them there is a direct request to the servant by the master or his representative to do so. No case, we think, has gone so far as to hold that, where the servant does not complain on his own account, and continues in his employment with full knowledge of the risk, he can recover of the master because the latter, when the defective condition was called to his attention by the servant, gave assurances, which did not induce the servant to remain, that the defect should be remedied. We think, therefore, that the evidence shows either that the plaintiff was not in the exercie of due care, or

that he had assumed the risk with full knowledge and appreciation of it, and that the exceptions must be overruled, and judgment entered on the verdict." :

The case of *Lewis vs. Railroad Co., supra*, states the correct rule in regard to a servant calling attention to danger and afterwards continuing in the employment. This rule is, that in order to recover in such a case a servant must have complained *on his own account* and must have continued in the employment, *because he was induced to do so by a promise made to him personally* that if he would remain in the employment the defect should be remedied. *The promise must have been the inducement* to remain, otherwise the servant cannot recover. In accordance with this case the Court should have instructed the jury, as requested (Record, p. 102, No. 7), that if they believed the evidence (Record, p. 81) that Reddon sounded the rib and found it was dangerous, but yet concluded that it would hold while he shoveled up the coal, he assumed the risk and cannot recover. The Court also should have directed a nonsuit as above stated.

On the point that the Court should have directed a nonsuit, see *Central Transportation Company vs. Pullman Car Co.*, 139 U. S., 24, 38, 40.

For these reasons, as well as those stated in the two briefs heretofore filed, the judgment should be reversed, and a new trial granted.

JOHN F. DILLON,
HARRY HUBBARD,
For Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 349.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM C. REDDON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO DEFENDANT'S BRIEF.

JOHN F. DILLON,
SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
HARRY HUBBARD,
For Plaintiff in Error.

C. G. BURGOYNE, WALKER AND CENTRE STS., N. Y.

SUPREME COURT OF THE UNITED STATES,

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Plaintiff in Error,

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Brief for Plaintiff in Error in Reply to Defendant's Brief.

This case is of such great importance, not only to the plaintiff in error, but to all the great mining interests of the country, that we feel it due to the Court to reply shortly to the brief of the defendant in error. It is unnecessary to remind this Court that coal-mining is a dangerous business—necessarily so; and that men who work in mines know that the business is dangerous, and consider and assume the danger when they enter upon their

work. It is a part of their contract that they assume the dangers, and they are paid for so doing. After such contract, if a miner be injured by a danger which he has assumed, it is a great misfortune, it is true, but he has no recourse to his employer. Common justice so dictates, and the the law is well settled that this is the rule. In the present case, it is our judgment that on the undisputed facts of the case, as shown by his own testimony, the plaintiff below was not entitled, either by the law of England or by the law of this country, to recover. It is furthermore our judgment that if the Court did not err in refusing to take the case from the jury, it did err in refusing to give to the jury correct instructions applicable to the facts of this particular case.

LET US HERE CAREFULLY SUMMARIZE THE UNDISPUTED AND MATERIAL FACTS.

Reddon went to work in the mine December 1, 1884, as a "day man," that is, as a laborer paid by the day (Record, p. 5).

The work for which he was hired was shovelling up coal that had fallen and was falling from time to time from the ribs and roof of the mine (the very work he was doing when he was injured); and also repairing and laying track as it was needed in the mine. Reddon's first work in the mine was to clear up the coal that had fallen and was then falling in the fifth entry of the mine (Record, pp. 5-6, 8). This work lasted for about a month and a half, continuously, that is, from December 1 to about January 15 (Record, p. 8); and "the rib was falling off more or less all the

time;" and this was "so all through the entry where he was clearing it up," "all the way in the entry" (Record, p. 8). Some timbering was done in the fifth entry in December and January (Record, p. 8). But this timbering was all done *after* Reddon and others had cleared up the coal (Record, p. 8). Reddon's work of clearing up the coal "necessarily had to be carried on ahead of the timbering" (Record, p. 25, bottom). This timbering was all stopped about a week before Reddon and others finished that job of clearing up the coal that had fallen at that time; that is the timbering was all stopped about January 8 (Record, p. 25). No timbering was afterwards done in the fifth entry. During all the time from December to May, continuously, coal was falling in the fifth entry of the mine "nearly every day" at "some place in the entry" (Record, p. 28). Reddon was "familiar with that fact" (Record, p. 28); he was also, as a "day man" at work during all this time at clearing up the coal that from time to time had fallen and was falling in the fifth entry, and in other parts of the mine, but especially in the fifth entry (Record, pp. 28-29). Reddon testified (Record, p. 29) in regard to the fifth entry, "*there would generally be coal there every morning, having fallen from the ribs, so that it was usual to remove more or less coal every day, and that this was the condition during all this period from the time that he went there in December up to the time of the accident, continuously.*" The testimony of the plaintiff Reddon also shows that he both entered upon the employment and continued in it with full knowledge of the danger. He testified (Record, p. 11) that **"it was what I considered dangerous—falling more or less all**

the time. I considered it dangerous myself;" that "*coal kept falling on the entry from the rib —on the fifth entry; that was the most; that was considered to be the dangerousest entry in the mine. So considered by myself and miners.*" Reddon "had been in the business of coal mining for about fifteen years," and was "familiar with the methods of operating a mine" (Record, p. 10). He knew the usual method of testing with pick or hammer to see whether coal was likely to fall (Record, p. 31); he further testified that he himself tested certain parts of the fifth entry for the foreman Thomas (Record, p. 31). He says, "that is a test miners are in the habit of making" (Record, p. 31). Other undisputed testimony in the record also shows that workmen in mines are in the habit of making such tests at any place where they are about to go to work (Record, pp. 57, 74–75, 77–78, 79, 93–94).

The plaintiff Reddon testified that about the 18th of May, 1885, when the foreman Thomas happened to come through the fifth entry where Reddon was then working, he had a certain conversation (set out at length, *infra*) with Thomas with regard to danger from coal falling in the fifth entry (Record, pp. 13–14, 29–30, 31–32). It is on account of this conversation, and this alone, that the Supreme Court of the Territory affirmed the judgment of the District Court (Record, p. 113). This conversation was about a week before the accident to the plaintiff, which accident happened on May 25, 1885, as alleged in the complaint (p. 1) and shown on the trial (p. 15). This is material to be borne in mind.

The following is the statement of the case of defendant in error as set forth in his counsel's brief (pp. 2–3):

"The negligence of the defendant consists: first, in not properly timbering the entry; and, second, in not taking down the coal as requested by the plaintiff.

"The plaintiff was induced to remain by the assurances made by the foreman. The conversation was as follows, folio 18, p. 13:—

'Q. While he was in charge there, what did you do by the way of calling his attention to the dangerous condition of this entry? A. I told him that the wall—that the entry was dangerous, and that if the coal was not taken down, that somebody would get hurt sooner or later." * * * "I took him and told him this coal was going to fall if it was not taken down. I was afeard and took him along the road and all the way in, and sounded the coal for him, until I got him into the room where Mr. Locke worked—John Locke—and that was the dangerousest place there was, between his rib and the next one, and he says: "Bill," he says, "that won't fall yet. You have no idea how this coal will hang;" and he says, "I can't stop the turn to take it down now; but," says he, "I will take it down some other time." Them was just the words he used, as near as I can get at it.

Q. What more did he say, if anything, than that he wanted to keep the turn running? A. Why he didn't say anything, only as I told you; he said that he couldn't stop the turn then to take it down, but that he would take it down some other time—have it taken down.'"

Analyzing this conversation, which is set forth in defendant's brief, at page 2, as the specific ground of liability, the learned counsel disclaiming that there is any liability for the *general* danger of the mine, it appears: *(a)* that the plaintiff was aware of the danger from falling coal and called attention to it; *(b)* that no inducement was held out by the foreman to the plaintiff to continue to work; *(c)* that no

promise was made to repair the difficulty at any particular time, but rather a statement that it would not then be repaired. This conversation, moreover, did not relate to that part of the entry where Reddon was subsequently injured (see our main brief, pp. 30–31).

The above-quoted conversation between Reddon and the foreman Thomas occurred, so Reddon testified, about a week before the accident.

On the morning of the accident, May 25, the following occurred, as testified to by THOMAS TANGEY (Record, p. 81):

"Q. Did you ever talk with Mr. Reddon as to how this accident came about and hurt him?

"A. Yes, sir.

"Q. When and where?

"A. I believe, sir, it was about eight nights after he had got hurt. I went to stop up with Mr. Reddon to see him during the night, and I asked William Reddon how he got hurt, and he told me that he was loading some coal from the side of the track AND HE SOUNDED THIS—HE THOUGHT THIS COAL WAS SO BAD—AND HE SOUNDED THIS PIECE OF COAL AND IT WAS BAD, BUT HE SAYS HE THOUGHT IT WOULD STAND UNTIL HE GOT THROUGH HIS WORK, and while he was performing his duty the coal came and catched him between the ribs and the cars.

"Q. So he said that he had sounded it and found that it was bad?

"A. Yes, sir.

"Q. *But thought it would hold until he got the coal shoveled up?*

"A. *Until he got through where he was working.*"

Even if there were no other error in the case, the instruction of the Court with regard to the effect of this testimony was a material and controlling feature of the case. It thus appears that *on the very morning of the day on which the plaintiff was injured*, without any direction from the foreman, without any control of his

actions by the foreman, *he sounded the coal on the very rib which did the injury, and found that it was bad*, but reached the mistaken conclusion and judgment in his own mind that it would stand until he got through with the work; and then, without any order or direction from or promise by the foreman, voluntarily went to work shoveling up the coal at this particular place, when the coal which he had supposed would stand until he got through fell and caused the injury. As said above, this is a controlling and decisive feature of the case. It matters not that they had stopped to timber the mine in the month of January preceding, it matters not that the conversation may have occurred a week before the accident, which is testified to by the plaintiff—all this became unimportant when the plaintiff, at the very time he was injured, had discovered the danger, says he knew it, and formed his own judgment that it would be safe for him to continue to work there—without any action, or control, or direction on the part of the foreman—that it would be safe for him to work there until the coal was shoveled up.

On this state of facts we hold the law to be settled, and rightly settled, that the employer is not liable. The plain principle of law applies to the case, that if, under these circumstances, he knew the danger, and thus voluntarily exposed himself to it, he cannot recover. The instructions which the plaintiff in error asked to that effect were not given, but were emasculated and perverted so that the question of law on which this case turned was not submitted to the jury (see our main brief, pp. 60 *et seq.*).

The principles of the common law, as it exists in-

dependently of statute, and as it applies to the present case, are well stated in *Yarmouth vs. France*, L. R., 19 Q. B. D., 647, 649, 651.

"Lord ESHER, M. R.: In this case the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts or trolleys and horses. Amongst these was a horse which was of an extraordinarily vicious nature and wholly unfit, so far as is stated to us, to be driven even by the most careful driver. The plaintiff objected to drive him, and told the foreman of the stable that the horse was unsafe to drive; whereupon the foreman said: 'You have to drive him; and, if any accident happens, we (meaning the employer) will be responsible.' The plaintiff continued to drive the horse, and whilst so doing, sitting on a part of the trolley where it is said to be usual and not improper for the driver to sit, the horse kicked out and broke the plaintiff's leg. The plaintiff thereupon sues the owner of the horse, his employer." * *

The first question here is whether this case is within the Employers' Liability Act at all. If it be not, then, according to the old law, if that act had not existed I have no doubt this plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective—in such a state that it would be culpable want of care for the safety of his servants on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events, it was a thing which was patent, so that any person in the employ could know and see it. The horse here in question was not accidentally or suddenly vicious, but inherently vicious, and known to be so. Under the old law it would have been said: 'You' (the servant) '*have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer.*' As between master and servant, that was the way the immunity from liability was always stated."

The case above referred to was decided under the English Employers' Liability Act. There is no such act in Utah, and none such applicable to the present case. The principles of the common law above stated do, however, apply and prevent any recovery on the part of the plaintiff Reddon.

The principle stated by Lord ESHER in the above extract, that a servant must be presumed on entering on his employment to take all the ordinary risks of it and to assume all dangers that are open and palpable, is the undisputed law of England and America. It has been frequently recognized in this Court. See Mr. Justice FIELD's language in the case of the *Northern Pacific R. R. Co. vs. Herbert*, 116 U. S., 642, 647; and see the *Ross Case*, 112 U. S., 377, 383, where the same learned Justice says:

"Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

See, also, opinion by Mr. Justice GRAY in *Randall vs. Railroad Co.*, 109 U. S., 483, and by Mr. Justice HARLAN in *Hough vs. Railway Co.*, 100 U. S., 213, 227.

In Mr. Pollock's instructive essay (see Jurisp., pp. 127, 128, 131–133; Pollock on Torts, p. 85) the result of all the discussions and decisions on this subject is thus summarized:

"The settled doctrine and its rationale, according to

the English authorities, and the judicial judgments in this country, is this:

"That the servant must be presumed, in entering on his employment, to take all the ordinary risks of it, including the risk of accidents happening by the neglect, acts or omissions on the part of other persons (servants) engaged in the same undertaking."

We do not state this because of its reference to the case of common employment, but because it lays down the sound principle applicable alike to the defense of fellow servant or common employment, and to the whole law of torts, namely, that the servant, in entering upon the employment, assumes all the ordinary risks of it and all risks which are open and palpable. That principle applied to this case would have decided it in favor of the defendant. It was not applied; and we insist that we are entitled to a judgment of reversal, to the end that we may have a trial under directions to apply this principle to the case.

With this introduction we proceed to review and reply to brief for defendant in error.

Specific Points in Reply to Brief of the Defendant in Error.

STATEMENT OF FACTS IN BRIEF, FILED ON BEHALF OF THE DEFENDANT IN ERROR, IS INCORRECT AND MISLEADING.

We will not here go over in detail the statement of facts in the case; for such a statement, so far as it is necessary, we refer to what is said above and to our main brief. We wish merely to point out some of the misstatements of the facts in the brief filed in behalf of the defendant in error.

At page one of that brief, counsel for defendant in error, says:

"That level had been dangerous for some time, and the defendant had commenced to timber the level, and having timbered aways stopped on account of being too busy."

The impression which is conveyed by this statement is that the timbering had *just been stopped* at the time when the accident occurred. Such was not the fact. The timbering was begun in December and was stopped in January. The accident did not occur until May.

Again, counsel for defendant (Brief, p. 1) says: "A *few days* before the accident plaintiff went to the foreman, &c." The testimony of plaintiff Reddon was that he spoke to the defendant Thomas *about a week* before the accident. Again (Brief, p. 1 and 2), counsel for defendant says: "The foreman of the mine promised to remedy it in a *short time*, but said he could not do it just then." There is no such testimony in the record. What plaintiff Reddon did testify was that the foreman said: "That won't fall yet; you have no idea how this coal will hang." "I can't stop the turn to take it down now, but I will take it down *some other time*." This is a materially different thing from the statement of the testimony as made by counsel for defendant in error.

Counsel for defendant in error states (Brief, p. 2): "The plaintiff was induced to remain by the assurances made by the foreman." There is no evidence in the record to show that this conversation constituted the inducement for the plaintiff to remain in the employment. For all that appears in the record the plaintiff placed no reliance whatever upon this con-

versation with the foreman, but remained in the employment merely for the same reasons that he would have remained if no conversation had taken place. This matter is discussed in our main brief (pp. 37–44).

There are other erroneous and misleading statements as to the facts which the testimony tended to prove contained in various parts of the brief of counsel for defendant in error. Those which we have mentioned above, however, are sufficient to call the attention of the Court to the fact that in considering the case it should, as it undoubtedly will, carefully read the record instead of relying upon statements in brief of counsel for defendant in error.

COUNSEL FOR DEFENDANT IN ERROR ADMITS that as respects the danger in the mine generally there is no liability on the part of the defendant. He says (brief, p. 6):

"This mine at the time of this transaction was undergoing a 'crush' or 'squeeze;' that is, the ground was settling. The entire mine was unsafe. *So far as this hazard is concerned we claim no liability on the part of the master.*"

Here is a clear and unequivocal statement on the part of counsel for defendant in error that, as respects the *general* danger of the mine, he claims no liability. This is clearly the law, as the authorities cited on our main brief show. The counsel for defendant in error, however, continues:

"But the master knew it; his foreman knew it. The extra danger occasioned by it required extra caution on the part of the master and foreman. It required extra caution and effort to protect the laborers in their lives

and in their persons. The fifth entry was known to be dangerous before work began upon it, and it was for that reason that they began to timber it; and after timbering several hundred feet suddenly the timbering was stopped."

A complete answer to all such argument is that the plaintiff Reddon had full knowledge of all the facts as to the danger in the mine and particularly in the fifth entry of the mine as it existed from the time timbering was stopped in January until May, when the accident occurred.

COUNSEL FOR DEFENDANT IN ERROR STATES (Brief, p. 2): "The negligence of the defendant consists *first, in not properly timbering the entry, and second, in not taking down the coal as requested by the plaintiff.*"

In regard to the negligence alleged in not PROPERLY TIMBERING THE ENTRY it is sufficient to say that the failure to timber was not negligence as respects the plaintiff; for he was hired, among other things, expressly *for the purpose of working where timbering had not been done.*

The very first work that Reddon did in the mine was to shovel up coal that had fallen in the fifth entry—the same kind of work that he was doing when he was injured. He worked at that particular work in that entry during the first month and a half of his employment (Record, pp. 7 8), and during all that time the work of clearing up coal necessarily had to be carried on ahead of the timbering (Record, pp. 25 26; see Record, pp. 7 and 8.) Again, the timbering was all stopped about the middle of January, while the accident did not occur until May. During all

the time from January until May the plaintiff Reddon knew the condition of the mine, and particularly of the fifth entry, and knew that coal was falling there almost daily. He so testified himself. By thus voluntarily working in the mine for several months after timbering had ceased, and with a full knowledge of the actual condition and dangers of the mine, the plaintiff assumed all the risks of danger which were due to any alleged failure to timber the mine properly. It must be borne in mind that the plaintiff was not a novice at mining. He had been in the business for about fifteen years, and was familiar with the methods and dangers of mining.

COUNSEL FOR DEFENDANT IN ERROR STATES (Record, p. 7), that "the whole entry was complained of," meaning the fifth entry. This statement is not accurate. If the testimony of Reddon is examined it will be seen that, though he testified (Record, p. 13) that he told Thomas, the foreman, "that the entry was dangerous, and if the coal was not taken down that somebody would get hurt sooner or later," yet when the foreman Thomas's attention had been thus called to the danger he asked Reddon *where the danger was*. Reddon testified (Record, p. 30) that the foreman Thomas asked him, "Bill, where is it bad?" and that in reply Reddon *showed the foreman where and in what part of the entry the danger was*. In doing so he did not call the foreman Thomas's attention to any danger in that part of the entry where Reddon was subsequently injured, but began with Thomas at *a considerable distance further from the slope than the place*

where Reddon was afterwards injured and walked with him still further away from the slope and called his attention to danger from falling coal only in those parts of the entry a considerable distance further away from the slope. The danger complained of, therefore, was not danger in the fifth entry in every part of it, but only in certain parts which were specially pointed out and which were at a considerable distance from the place where Reddon was subsequently injured. The general statement which Reddon testified that he made at the beginning of his conversation with the foreman Thomas was thus afterwards qualified and narrowed down, so that the danger that he complained of was not danger in that part of the entry where he was injured.

The danger at that part of the entry where the plaintiff Reddon was injured was only the *general* danger produced in the mine by the crush or squeeze. This was danger incident to the employment, and was a danger of which the plaintiff Reddon was well aware, and the risk of which he assumed as a risk incident to his employment. This is in accordance with the settled principles of law. Counsel for the defendant in error admits that this is true, when he says (Record, p. 6): Brief

"So far as this hazard is concerned, we claim no liability on the part of the Master."

The counsel for the defendant in error states (Brief, p. 7, near the bottom): "He (Reddon) was further assured that the entry would be fixed and the defect adjusted, so that it would be safe to

work there." This is not correct. The complaint which Reddon testified he made to the foreman Thomas was of the danger of coal falling in certain parts of the entry—not at the place where Reddon was injured. The reply of the foreman was in substance *that the coal was not dangerous, that he could not take the coal down then, but would some other time.* This is a wholly different thing from assuring the plaintiff Reddon "that the entry would be fixed and the defect adjusted so that it would be safe to work there." See on this point as to facts and law, our main Brief, p. 37 *et seq.*

Counsel for Defendant in Error (Brief, p. 8), refer to the case of *M., H. & O., Ry. Co. v. Spear*, 44 Michigan, 169, a case which shows that an indefinite promise on the part of a master to remove danger "some other time" is not sufficient within the rule that a promise to repair or remove a danger made by the master may sometimes render him liable in case of injury to the servant which happens after such promise was made. In referring to this case counsel for defendant in error attempted to distinguish it from the present one, but the case is not distinguishable. The principal in both cases is precisely the same. The gist of the action in both cases is negligence, and if the plaintiff would have a right to rely upon an alleged promise to remove the danger in one case, he would have the same right equally in the other case (see our main brief, pp. 39–42).

Counsel for defendant in error cites cases at page

10 of his brief under Point IV., to show that *contributory negligence is not ground for non-suit.* These cases do not show that a question of contributory negligence is always under all circumstances a question of fact for the jury. When the facts are not disputed and when it is impossible to draw any other conclusion from the facts except that the plaintiff was guilty of contributory negligence, then the Court not only may but ought to nonsuit the plaintiff or direct a verdict for the defendant (see on this subject our main brief, pp. 16–18, and cases cited). This rule was recognized in both of the decisions cited by the counsel for the defendant in error. In *Jones vs. Railroad Company*, 128 U. S., 443, this Court, speaking through Mr. Justice MILLER, says (p. 445):

"The evidence is embodied in the bill of exceptions before us and we cannot agree with the Circuit Court that there was such a clear case of negligence on the part of the plaintiff as to justify the Court in withdrawing the whole subject from the consideration of the jury."

The Court in that case cite *Kane vs. Railway Company*, 128 U. S., 91. In this last case Mr. Justice HARLAN, delivering the opinion of this Court, correctly states the rule upon this subject (p. 94):

"The Circuit Court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled in the exercise of a sound judicial discretion to set aside any verdict returned in his favor. If the evidence giving the plaintiff the benefit of every inference to be fairly drawn from it sustained this view, then the direction to find for the defendant was proper" (citing cases).

The same rule is stated in *Railroad Company vs. Stout*, 17 Wall., 657–663.

COUNSEL FOR DEFENDANT IN ERROR cites certain cases on his brief, page 11, as showing that the introduction of evidence by the defendant, after the motion was made for a non-suit, was a waiver of the motion for non-suit. These cases all came from *Circuit Courts of the United States*. We refer to this fact in our main brief (pp. 11–16) and make a complete answer to this suggestion of counsel for the defendant in error.

COUNSEL FOR DEFENDANT IN ERROR STATES (brief, p. 11) that the fifth assignment of error is insufficient. We suppose the counsel refers to the fifth assignment of error printed in the record at page 118. But this assignment is clearly sufficient; for it shows definitely what instructions are assigned as error by a reference to page 100 of the Record. On that page, at the end of the instructions given by the Court, it is stated:

"To the giving of which instructions numbered 4, 5, 6, 12 and 13 respectively, and each of them so given at the request of the said plaintiff, the said defendant then and there excepted."

The fifth assignment of error is as follows: (Record, p. 118):

"Said Supreme Court erred in sustaining the action of the said District Court in giving the jury each of the said several instructions which it did give as shown in the foregoing record at the request of the defendant in error (the plaintiff in said District Court) as shown in the above Record."

The statement above quoted from page 100 is in substance that these instructions, the numbers of which are specifically mentioned, were given at the request of the said plaintiff. The assignment of error is that the Court erred in giving the instructions which it did give, as shown in the foregoing record, at the request of the plaintiff. The assignment of error, therefore, is perfectly definite as to the error committed by the Court.

However this may be, we have made a definite and sufficient assignment of errors in our main brief, as required by the rule of this Court; and such assignment within the decisions of this Court is sufficient to bring before this Court the errors alleged therein.

See

Ackley vs. Hall, 106 U. S., 428.
Benites vs. Hampton, 123 U. S., 519.

We submit that the judgment of the Supreme Court of the Territory should be reversed and a new trial granted.

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